

N. A. Malbary and Bros.

Vs

Commissioner of Income-Tax, Bombay North

Civil Appeal No. 878 of 1962

(A. K. Sarkar, M. Hidayatullah, J. C. Shah JJ)

25.11.1963

JUDGMENT

SARKAR J. –

This is an appeal against a judgment of the High Court at Bombay, given on a case stated to it under the Income-tax Act and answering in the affirmative the following question :

"Whether the levy of Rs. 68,501 as penalty for concealment in the original return for the assessment year 1951-52 is legal ?"

The question arose in the assessment of the appellant, a firm, for the year 1951-52 in respect of which the accounting year was the calendar year 1950. The assessee carried on business at Surat. It had a branch at Bangkok to which it exported cloth from India. The branch also made purchases locally and sold them. During the last world war the business at Bangkok had been in abeyance but it was re-started after the termination of the hostilities.

In its return for the assessment year 1949-50 the assessee did not include any profit of the Bangkok branch but stated that the books of account of the Bangkok branch were not available and that therefore its profits might now be assessed on an estimate basis subject to action under section 34 or section 35 on production of statement of account. The assessment was thereupon made on the basis of profit at 5% on the export to Bangkok branch appearing in the Surat books.

For the year 1950-51 again there was no reference to the Bangkok branch in the return and a similar estimate was made for this year also. For the year 1951-52 also the Bangkok business profits were not shown but on January 11, 1952, the Income-tax Officer issued a notice to the assessee under section 22 (4) of the Act to produce the profit and loss account and balance-sheet with the relevant books. The assessee excused itself by alleging on January 29, 1952, that the books were at Bangkok and the profit and loss account and the balance- sheet could not be drawn up unless its partner, Hatimbhai A. Malbary, went there personally and there was no certainty as to when he would go there and promising that in the following year these accounts for the calendar year 1950 would be produced. Thereupon the Income-tax Officer made an estimate of the sales of the Bangkok branch at Rs. 7,50,000 and of the net profits at 5% thereon, amounting to Rs. 37,500. This assessment was made on January 31, 1952. On the same day he is

In the meantime assessment proceedings for the year 1952-53 had commenced and this year also the assessee adopted a similar attitude as in the previous years. The Income-tax Officer was however insistent and, therefore, after various adjournments, the assessee had on August 17, 1953, to produce

the accounts and books of the Bangkok branch. It appeared from these books that in the calendar year 1950 the assessee had made a profit of Rs. 1,25,520. The Income-tax Officer thereupon commenced proceedings under section 34 of the Act against the assessee in respect of the assessment year 1951-52 and gave notice to the assessee to submit a return. The assessee then submitted a return stating therein correctly the profits for the calendar year 1950. The Income-tax Officer completed that assessment after directing the issue of a further notice under section 28 (3) on April 8, 1954, requiring the assessee to show cause why penalty should not be levied for deliberately concealing the particulars of his income of 1950. P

The assessee appealed to the Appellate Assistant Commissioner against both the aforesaid orders of penalty but the appeals were rejected. There is no dispute as to the assessment of the income. The assessee then appealed to the Income-tax Appellate Tribunal. The Tribunal observed : "It is indeed difficult to understand the action of the department in splitting up one offence into two proceedings. So far as the levy on the basis of the section 23 (3) assessment is concerned it appears to have no basis as till that stage the department had not succeeded in establishing and bringing home any guilt. It was still in the region of estimate... The levy of Rs. 20,000 has to be remitted in full. The levy of Rs. 68,501 is entirely different. With the definite knowledge that the Income-tax Officer had obtained that the profit for the year was Rs. 1,25,520 he has clearly proved the guilt of concealment against the assessee... The penalty is not at all excessive and accordingly confirmed." The revenue authorities never q

Thereafter, the assessee obtained a reference to the High Court of the question which we have set out at the beginning of this judgment. That question, it will be noticed, referred only to the penalty of Rs. 68,501 imposed pursuant to the second notice under section 28 (3) for concealing the particulars of the income of 1950. It has to be observed that in the return that was filed in the proceedings started under section 34, the assessee furnished correct particulars and it also produced the books. So it had not committed any default in connection therewith. The notice must therefore be taken to have been in respect of the original concealment of the income. The assessee knew - and this is what was found by the Tribunal and that is a finding of fact which is binding on a court in a reference - that its profits were Rs. 1,25,520 and it had not disclosed that profit originally nor produced the relevant books but permitted the Income-tax Officer to proceed on an estimate of that profit at Rs. 37,500. It was con

In this court Mr. Kola has urged that the second order for penalty was illegal because there was one concealment and in respect of that an order for penalty of Rs. 20,000 had earlier been made. He contended that there was no jurisdiction to make the second order of penalty while the first order stood and for that reason the second order must be treated as a nullity. He further stated that the fact that the first order was subsequently cancelled by the Tribunal would not set the second order on its feet for it was from the beginning a nullity as having been made when the first order stood.

We are unable to accept this argument. It may be that in respect of the same concealment two orders of penalty would not stand but it is not a question of jurisdiction. The penalty under the section has to be correlated to the amount of the tax which would have been evaded if the assessee had got away with the concealment. In this case having assessed the income by an estimate, the Income-tax Officer levied a penalty on the basis of that estimate. Later when he ascertained the true facts and realised that a much higher penalty could have been imposed, he was entitled to recall the earlier order and pass another order imposing the higher penalty. If he had omitted to recall the earlier order that would not make the second order invalid. He had full jurisdiction to make the second order and he would not lose that jurisdiction because he had omitted to recall the earlier order,

though it may be that the two orders could not be enforced simultaneously or stand together. However, in the present case the earlier o

It was also said that when the first order of penalty was passed the Income-tax Officer was in possession of the full facts which would have justified the imposition of the higher penalty. It was pointed out that the first order of penalty was passed on January 22, 1954, while the books disclosing the real state of affairs had been produced before the Income-tax Officer on August 17, 1953. It was contended that if in spite of this he passed the order imposing a lower penalty, he had no right later to change that order. In support of this contention reference was made to C. V. Govindarajulu Iyer v. Commissioner of Income-tax. There it was argued that the original proceeding under section 23 (3) and a proceeding under section 34 in respect of the same period were different and in the latter proceeding a penalty could not be imposed for a concealment in respect of the original proceeding. Rajamannar C.J. rejected this contention and held, "that so long as the proceedings under section 34 relate to the assessmen

But assume that this statement of the law is correct. It has no application to the present case. What is said is that if the default which entails the penalty was within the knowledge of the authority when it passed the final order in the prior proceeding no penalty could be later imposed. Now Rajamannar C.J. was not dealing with a case in which two penalties had been imposed. The case before him was one in which no return had been filed pursuant to general notice but subsequently section 34 proceedings had been started and resulted in an assessment and an order imposing a penalty was thereupon passed. The final order in the prior proceedings referred to by the learned Chief Justice must, therefore, be final assessment order in the prior proceedings. Now in the present case the final order in the prior assessment proceedings was made on January 31, 1952, and on that date the Income-tax Officer had no knowledge of the concealment of income of Rs. 1,25,520. Therefore, it seems to us that the observation of Raj

The result is that the appeal fails and it is dismissed with costs.

Appeal dismissed.

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