

## KERALA HIGH COURT

Jos Chacko

Vs.

Income-Tax Officer

O.P. No. 60 of 1956

(M.S. Menon, J.)

12.03.1957

### JUDGMENT

**M.S. Menon, J.**

1. Ext. B dated 13-9-1954, an order of the Income-tax Officer Ernakulam Circle, Ernakulam, under Section 28 (1) (c) of the Indian Incometax Act, 1922, concluded as follows:

"It is evident therefore that the assessee was guilty of suppression of income. 'thus, considering all aspects of the case, a penalty of Rs. 750/- is imposed after obtaining the Inspecting Assistant Commissioner's previous sanction. This will be got adjusted from the refund of Rs. 6417-10-0 in respect of 52-53 assessment".

2. The petitioner took up the matter in appeal before the Appellate Assistant Commissioner of Income tax. Trivandrum. Ext. C dated 29-11-1955 is the order in appeal.

"This is an appeal against the levy of penalty under Section 28 (1) (c) for concealment of income by the appellant. The penalty had originally been contested on merits but at the hearing 'Mr. Chummar questioned the legal validity of the penalty order itself. He pointed out that no hearing had been given to the appellant before the passing of the order and that, in any case, no opportunity of being heard had been allowed to the appellant. He contends, therefore, that the penalty order is illegal. In support of this contention he quotes the recent decision of the Orissa High Court in the case of Srilla Sagarmal. Records show a hearing or an opportunity of being heard had not been given to the appellant before the passing of the penalty order. The order has been passed merely after considering the written explanation offered by the appellant in regard to the alleged concealment. In the circumstances, I hold that the penalty order is illegal. The penalty levied is accordingly cancelled. It should be refunded if already paid. The appeal

succeeds".

3. After the appellate order, the Income Tax Officer, Eanakulam Circle, Ernakulam, took up the matter again and passed Ext. F, an order dated 27-11-1956:

"This is a case where penalty proceedings were initiated u/s 28 (1) (c) for concealment of income and deliberately furnishing of inaccurate particulars.

The assessment for 1952-53 was completed on 31-3-53 on total income of Rs. 37,598/- as against Rs. 16,910-7-7 returned by the assessee. A lump sum addition of Rs. 5000/- was made to the gross profit to make up the proved deficiency in the same and Rs. 15,000/- was added back as unaccounted for investment in building. The Tribunal held that as the assessee was able to prove the cost of the building at Rs. 34,000/- and as Rs. 28,209/- had already been debited as expenditure for the same, the addition need be limited to the difference viz. Rs. 5791 /-and Rs 5000/- has already been added back there is no need for a further addition of Rs. 15,000/. In any event there is concealment at least to the tune of Rs. 5000/. The assessee was requested to appear in person at my office on 7-11-1950 for a hearing, but he did not avail of the opportunity but simply sent a letter wherein he stated that as the penalty originally imposed had been cancelled in appeal it is not open to me to resurrect the proceedings already closed. The Appellate Assistant Commissioner has in his appeal cancelled the penalty on the technical ground that no personal hearing was given to the assessee. That does not make the proceedings rightly instituted ab initio illegal; as such I am competent to pursue the proceedings and impose penalty afresh after giving an opportunity for personal hearing. As deliberate concealment has been conclusively established in this case, I impose a penalty of Rs. 750/-u/s 28 (1) (c) of the Income-tax Act, with the prior approval of the Inspecting Assistant Commissioner of Income-tax, Ernakulam.

The penalty should be paid on or before 25-12-1956".

4. The question that arises for decision is whether Ext. F can be sustained in view of Ext. C. S. 31 (3) (f) of the Indian Income-tax Act, 1922, provides that the Appellate Assistant Commissioner may, in the case of an order under Section 28, "confirm or cancel such order or vary it so as either to enhance or reduce the penalty", and Section 33 (2):

"The Commissioner may, if he objects to any order passed by an Appellate Assistant Commissioner under Section 31 direct the Income-tax Officer to appeal to the Appellate Tribunal against such order, and such appeal may be made within sixty days of the date on which the order is communicated to the Commissioner by the Appellate Assistant Commissioner".

No action has been taken under sub-section (2) of Section 33 and I must hold that the Income-tax Officer, Ernakulam Circle, Ernakulam, is not entitled to ignore Ext. C and proceed to impose a

penalty as he has done by Ext. F.

5. The petition is allowed. No costs.  
Allowed.