

Maney and Co. Vs. Commissioner of Income-tax, Kerala.

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Court : Kerala

Decided On : Oct-30-1961

Reported in : [1963]47ITR434(Ker)

Appeal No. : Income-tax Reference No. 23 of 1960

Appellant : Maney and Co.

Respondent : Commissioner of Income-tax, Kerala.

Judgement :

This is a reference by the Income-tax Appellate Tribunal, Madras Bench, under section 66(2) of the Indian Income-tax Act, 1922. The questions referred are :

- '1. Whether a penalty under section 28(1) (c) of the Indian Income-tax Act can be levied on the partners of a firm which has ceased to be in existence
2. Whether there is any evidence that the assessee have concealed the particulars of their income or deliberately furnished inaccurate particulars of such income which will justify the levy of a penalty under section 28(1) (c) of the Indian Income-tax Act
3. Whether, on the facts and in the circumstances of the case, the sum of Rs. 79,500 can be treated as the assessee's concealed income for the purpose of imposing a penalty under section 28(1) (c) of the Indian Income-tax Act.'

Question No. 1. - In view of the decision of the Supreme Court in C. A. Abraham v. Income-tax Officer, Kottayam, affirming the decision of this court in C. A. Abraham v. Income-tax Officer, Kottayam, it is agreed that this question has to be answered in the affirmative and against the assessee. We do so.

Question Nos. 2 & 3. - The assessment relates to the assessment year 1950-51. The accounting period is the Malayalam year 1124, the period from August 17, 1948, to August 16, 1949.

A sum of Rs. 79,500, not included in the return of the assessee, was added as the profits of the business during the year of account and the assessment completed on that basis. This is the sum specified in question No. 3.

The department levied the penalty in respect of another sum of Rs. 15,000 as well. The penalty in respect of that amount has been cancelled by the Appellate Tribunal and does not now arise for consideration.

The sum of Rs. 79,500 is made up of three items : (1) An item of Rs. 30,000, the total

of three sums of Rs. 10,000, each credited to the account of the three partners on 16-1-1124; (2) an item of Rs. 10,000 credited to the account of one of the partners on 17-3-1124; and (3) the difference - Rs. 39,500 - between the sum of Rs. 20,500 shown as the cost of a building in the accounts of the partnership and its cost of Rs. 60,000 as estimated by the department.

Section 28 of the Indian Income-tax Act, 1922, provides for the imposition of penalties for the concealment of income. The provision invoked by the department is subsection (1) (c) of that section. That provision is to the effect that 'if the Income-tax Officer, the Appellate Assistant Commissioner or the Appellate Tribunal, in the course of any proceedings under the Act, is satisfied that any person has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income, he or it may direct that such person shall pay, by way of penalty, in addition to any tax payable by him, a sum not exceeding one and a half times the amount of the income-tax and super-tax, if any, which would have been avoided if the income as returned by such person had been accepted as the correct income.'

The addition of the amounts concerned was - as already indicated - as part of the business income of the assessee during the accounting period. The difference between assessment proceedings and the proceedings for the imposition of a penalty under section 28 was brought out clearly by Chagla C.J. on Commissioner of Income-tax v. Gokuldas Harivallabhdas :

'It is true that in the assessment proceedings, it is open to the department to take the view that if a certain receipt appears in the books of account of the assessee, and the assessee is not in a position to give an explanation in regard to that receipt, that receipt constitutes an income from undisclosed sources. But the question that we have to consider is whether it is open to the department to come to a similar conclusion when proceedings are taken under section 28(1) (c). The proceedings under section 28(1) (c) in their very nature are penal proceedings, and the elementary principles of criminal jurisprudence must apply to these proceedings, and nothing is more elementary at least in this country in criminal jurisprudence than the principle that the burden of proving that the accused is guilty is always upon the prosecution'.

To the same effect are *Khemraj Chagganlal v. Commissioner of Income-tax and Fattorini Ltd. v. Inland Revenue Commissioners*, a decision of the House of Lords, wherein Lord Wright said that the onus in such a proceeding was not of an ambulatory or shifting character and that it was 'finally on the Crown to prove its right to impose' the penalty.

It is of course impossible to lay down any hard and fast rule as to what material is actually required. Each case, as so often repeated, must depend upon its own circumstances. The evidence in the assessment proceedings would be relevant and admissible material in penalty proceedings. They will, however, not operate as *res judicata* because of the essential difference between the two types of proceedings. All that can really be said is that the onus of proof is on the department, that the degree of proof is that of a criminal prosecution and that the mere preponderance of probability will not suffice as in the case of a civil action.

The item of Rs. 30,000, as already stated, is made up of three credits of Rs. 10,000 each to the accounts of the three partners on 16-1-1124. The significance of the fact

that the credits were just sixteen days after the opening of the accounting year has apparently not been realised. The overall picture of the years profits does not justify any such profit in the first sixteen days of the opening month of the accounting period and we think we should say that there is no material on record to support the conclusion reached by the department. We hold that there is no evidence to come to the conclusion that the assessee has concealed particulars of his income or deliberately furnished inaccurate particulars of such income in respect of the said amount and that we must answer questions Nos. 2 and 3 in the negative and in favour of the assessee as far as the sum of Rs. 30,000 is concerned.

This argument, however, is not available for the second item, namely, Rs. 10,000, credited to the account of one of the partners on 17-3-1124. BY that time profits to that extent could certainly have accrued and formed the subject-matter of the credit. And we hank the evidence and circumstances of the case are sufficient to support the conclusion that a penalty should be imposed as far as the said sum is concerned. This is not a case of 'no evidence'; that another body might have come to a different conclusion is of no material significance.

The assessee had an explanation that the said amount is the same as the sum of Rs. 10,000 withdrawn by the partner concerned on 30-2-1124 and debited to his account. This explanation was rejected by the department. It was entitled to do so and we are not prepared to say that the rejection was improper.

The third and the last item relates to the difference in the cost of a building as contended by the assessee (Rs. 20,500) and as estimated by the department (Rs. 60,000). The fact that the assessee's own engineer valued the building at only Rs. 28,450 is not conclusive. It has three floors and fetches an annual rent of Rs. 5,000. The Income-tax Officer dealt with the matter as follows :

'The firm had in the year put up a palatial building in the Pattalam Road; the investment in this as per their accounts was only Rs. 20,500; This is a three-storeyed building and its construction is on modern lines with high quality materials. I inspected the locality and had a close look at the building. The cost of this building can be easily estimated by a reference to the rental value and cost of another big building put in the same locality by another party, in the very same year;'

and came to the conclusion that type building would have cost not less than Rs. 60,000 'even on a most modest and conservative estimate.' We are not satisfied that the estimate was based on non-existent or insufficient material and must hold that the difference between the return and the estimated cost, Rs. 39,500, should attract the penalty as contended by the department.

In the light of what is stated in paragraphs 3 to 13 above we must answer questions Nos. 2 and 3 in the negative and in favour of the assessee so far as the sum of Rs. 30,000 is concerned and in the affirmative and against the assessee so far as the sums of Rs. 10,000 and Rs. 39,500 are concerned.

The three questions referred are answered as above. A copy of this judgment under the seal of the High Court and the signature of the Registrar will be forwarded to the Appellate Tribunal as required by sub-section (5) so section 66 of the Indian Income-tax Act, 1922.

Questions answered accordingly.

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