Mansukhlal And Brothers vs Commissioner Of Income-Tax, Bombay ... on 3 September, 1968

Equivalent citations: AIR1969SC835, [1969]73ITR546(SC), [1969]1SCR970, AIR 1969 SUPREME COURT 835

Bench: A.N. Grover, V. Ramaswami

JUDGMENT

Grover J.

1. This is an appeal by special leave from a judgment of the Bombay High Court in a reference made under section 66(1) of the Income-tax Act, 1922, hereinafter called the Act, answering the following question which had been referred to it in the negative and against the assessee :

> "Whether in computing for purposes of levy of penalty under section 28(1) (c) the amount of income-tax and super-tax which would have been avoided if the income as returned had been accepted such 'income as returned' includes item of income too, which though not actually returned had been added in the assessment solely on ground of lack of evidence ?"

2. The assessee is a firm dealing in hessian, twines, gunny bags, etc., on wholesale basis. For the assessment year 1948-49 the assessee had returned income amounting to Rs. 45,904. The Income-tax Officer, however, added two items of Rs. 24,000 and Rs. 90,000 as profits and income from undisclosed sources which had been concealed by the assessee. A penalty of Rs. 62,000 was imposed within the maximum limits provided by section 28(1) (c) of the Act. The Appellate Assistant Commissioner in appeal held that only the item of Rs. 24,000 be treated as concealed income and the other amount of Rs. 90,000 could not be treated as such for the purpose of imposing a penalty. In his opinion maximum penalty payable under section 28(1) (c) came to Rs. 30,000 and taking into consideration all the circumstances he imposed a penalty of Rs. 20,000 only on the assessee. In appeal the Appellate Tribunal agreed with the Appellate Assistant commissioner that there was no concealment in the matter in respect of Rs. 90,000 but affirmed the finding of concealment of the amount of Rs. 24,000. It was held by the Tribunal that, as there had been concealment of profit, it was wholly immaterial whether one item or more than one item had been concealed and the quantum had to be computed under section 28(l)(c) not on the basis of tax on the items proved to have been concealed but on the difference between the tax on the assessee's income as finally assessed and the tax which would have been avoided if the return filed by him had been accepted as correct. The Tribunal restored the order of the Income-tax Officer imposing a penalty of Rs. 62,000.

3. The argument which was addressed before the High Court was that on a true interpretation of section 28(1) (c) the penalty could be only 1 1/2 times of the tax payable on he concealed income. It

was urged that the maximum penalty had to be calculated on the basis of tax avoided, i.e., tax which had been evaded by reason of concealment and not tax that had escaped for any other reason because an assessee might take a mistaken view of fact or law and bona fide not include certain items of income in his return. The income-tax authorities might a different view and add that income but that addition would not attract penalty. In the words of the High Court the argument proceeded on the these lines :

> "The additions made by the income-tax authorities or the Tribunal to the income returned by him constitute part of the 'income as returned by the assessee.' In the present case, the only amount that has been added on account of concealment is Rs. 24,000. The rest of the additions on the ground of disallowance of certain expenditure and the addition of Rs. 90,000 as income from undisclosed source, are parts of the income returned by the assessee. The maximum penalty thus, which could have been imposed in the instant case, was one and half times the tax on the difference between Rs. 1,62,135 and Rs. 1,38,135 (Rs. 48,135 as computed by the Income-tax Officer and Rs. 90,000 added as income from undisclosed source.)"

4. On behalf of the revenue the position that was taken up and has been sought to be supported before us is that section 28(1) (c) provides that if an item of concealment of income is discovered the maximum penalty which can be imposed is 1.5 times the difference between the tax on the total income as finally assessed and the tax on the income shown in the assessee's return irrespective of the amount of concealment. On that basis the penalty leviable, in the present case, would be 1.5 times the amount of tax on the difference between the tax on Rs. 45,904 (returned income) and Rs. 1,62,135 (income as assessed by the Income-tax Officer). The High Court was of the view that the expression "income as returned" occurring in section 28(1) (c) means income disclosed by an assessee in the return and not income computed or assessed by the income-tax authorities minus the income added on the ground of concealment. The High Court found no legislative intent disclosed in the provisions of section 28(1) (c) which would link the avoidance of tax to the concealment of income or which would justify holding that the maximum penalty prescribed in the section had to be proportionate to the extent of the concealment. After considering certain decisions, the High Court, while appreciating that the penalty imposed appeared to be disproportionately heavy to the amount concealed, returned the answer against the assessee.

5. Section 28(1), to the extent it is material, is reproduced below :

> "(1) If the Income-tax Officer, the Appellate Assistant Commissioner or the Appellate Tribunal, in the course of any proceedings under this Act, is satisfied that any person -
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> (a) has without reasonable cause failed to furnish the return of his total income which he was required to furnish by notice given under sub-section (1) or sub-section (2) of section 22 or section 34 or has without reasonable cause failed to furnish it within the time allowed and in the manner required by such notice, or

(b) has without reasonable cause failed to comply with a notice under sub-section (4) of section 22 or sub-section (2) of section 23, or

(c) 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 be way of penalty, in the case referred to in clause (a), in addition to the amount of the income-tax and super-tax, if any, payable by him, a sum not exceeding one an a half times that amount, and in the cases referred to in clauses (b) and (c), 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..."

6. In C. A. Abraham v. Income-tax Officer, Kottayam , where the real question was whether penalty under section 28 could be imposed on a firm after its dissolution, it was said that by section 28 the liability to pay additional tax which is designated "penalty" is imposed in view of the dishonest contumacious conduct of the assessee. The penalty is not uniform and its imposition depends upon the exercise of discretion by the taxing authorities; but it is imposed as a part of the machinery for assessment of tax liability. It is contended, in the present case, by counsel for the appellant that if imposition of penalty under section 28 partakes of the character of additional tax the section ought not to be construed in such a manner that the penalty an be imposed in an amount wholly disproportionate to the amount concealed. The learned Solicitor-General, on the other hand, maintains that the object of the provisions relating to penalty contained in section 28 is to provide for an effective deterrent against tax evasion and that object can be achieved only if the penalty can be imposed irrespective of the amount of concealment so far as section 28(l)(c) is concerned. Our attention has been invited to Lord Howard De Walden v. Inland Revenue Commissioners ((1942) 1 K.B. 389 ; 25 T.C. 121, 134; 10 I.T.R. (Supp.) 90, 94)a in which the assessee had transferred valuable assets to foreign companies. He did not dispute that the transactions were of the kind described in the preamble to section 18 of the Finance Act, 1936, namely, to avoid income-tax by transfer of income to persons abroad. The Court of Appeal affirmed the judgment of Mac-naghten J. that the assessee was liable to be assessed to income-tax and surtax in respect of the whole income of the foreign companies. Dealing with the argument of counsel that the legislature could not have intended to produce a result according to which an entirely disproportionate penalty could be imposed on the taxpayer, Lord Greene, Master of the Rolls, observed at page 397 :

"The section is a penal one, and its consequences, whatever they may be, are intended to be an effective deterrent which will put a stop to practices which the legislature considers to be against the public interest. For years a battle of manoeuvre has been waged between the legislature and those who are minded to throw the burden of taxation off their own shoulders on to those of their fellow subjects. In that battle the legislature has often been worsted by the skill, determination and resourcefulness of its opponents, of whom the present appellant has not been the least successful. It would not shock us in the least to find that the legislature has determined to put an end to the struggle by imposing the severest of penalties."

7. There are certain decisions of the High Courts which do not support the contention canvassed by the learned counsel for the appellant but can be pressed into service on behalf of the respondent. As far back as the year 1933 Page C.J., delivering the judgment of the Full Bench, observed in Commissioner of Income-tax v. A. A. R. Chettiar Firm ((1933) 1 I.T.R. 285), that the maximum penalty that can be imposed under section 28(1) is a sum representing the difference between the tax on the income declared by the assessee and the tax on the income ascertained under the Act, in respect of which assessment has been made. This view was upheld by a Full Bench of five learned judges of the Rangoon High Court in A. A. R. Chettiar Firm v. Commissioner of Income-tax ((1934) 2 I.T.R. 386). In Kalidindi Subbaraju Gopalaraju & Co. v. Commissioner of Income-tax ((1955) 28 I.T.R. 162), a Division Bench of the Andhra Pradesh High Court presided over by Subba Rao C.J. (as he then was) had to consider a case in which the assessee had returned an income of Rs. 19,639 but his accounts had been rejected and a sum of Rs. 35,354 had deen added to his income. On the view that the assessee had concealed only two items of Rs. 1,000 each which he had received as the sale price of the goods sold, a penalty of Rs. 4,000 was levied under section 28(1)(c). It was held that, though there was evidence of concealment in respect of two items of Rs. 1,000 each, the penalty under the aforesaid section could be levied on a sum not exceeding l 1/2 times the difference between the amount of the income-tax and super-tax, if any, actually imposed and the amount of such tax as would have been payable if the original return had been accepted as correct.

8. The only decision of this court on which reliance was placed by counsel for the appellant is N. A. Malbary & Bros v. Commissioner of Income-tax ((1964) 51 I.T.R. 295 (S.C.). In that case penalty had been imposed on an assessee twice for concealment of income relation to the assessment year 1951-52. When the assessee had submitted his original return it had been found that he had concealed certain income and a penalty of Rs. 20,000 was imposed. Later the Income-tax Officer issued a notice under section 34 and levied a second penalty of Rs. 68,501 for concealment of income in the original return. The contention of the assessee was that the second order imposing penalty was illegal. This contention did not find favour with this court and it was observed that the penalty under the section had to be co-related to the amount of tax which would have been evaded if the assessee had got away with the concealment. The Income-tax Officer had levied the penalty on the first occasion after making an assessment of income by an estimate. Later, when he ascertained the true facts and realised that a much higher penalty could be imposed, he was entitled to recall the earlier order and pass another order imposing a higher penalty. What has been stressed on behalf of the appellant, in the present case, is that the penalty has to be co-related to the amount of tax which would have been evaded if the assessee had got away with the concealment. It must be remembered that the question which has come up for consideration before us is altogether different from the one which was determined in the case of N. A. Malbary & Bros. , as is apparent from the facts which have been stated. It would not be right to look only at the aforesaid observations divorced from the context. Indeed, the imposition of penalty on two occasions was upheld on the ground that imposition of a much higher penalty was called for in the circumstances of that case but there was no discussion of the actual basis on which penalty had to be calculated or imposed under section 28(1)(c).

9. There is decision of the House of Lords in Inland Revenue Commissioners v. Hinchy ((1960) 1 All E.R. 505; (1961) 42 I.T.R. 800 (H.L.), in which certain observations were made which are quite

apposite for the purpose of the present case. Section 25(3) of the Income-tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c. 10) provided, inter alia, that a person who neglects or refuses to deliver, within the time limited in any notice served on him, or wilfully makes delay in delivering a true and correct list, declaration, statement or return which he is required under the preceding provisions to deliver shall, if proceeded against, by action in any court list, court forfeit the sum of Pounds 20 and treble the tax which he ought to be charged under the aforesaid Act. The respondent in that case had returned an income of Pounds 18 6s. for a particular assessment year. It was discovered that he had made an under-statement and an assessment was made on him for Pounds 14 5s. The Commissioner of Inland Revenue later on brought an action claiming from him, under section 25(3)(a), the fixed penalty of 20 and also "treble the tax which he ought to be charged under this Act", which sum they computed at 418 14s. 6d., being three times his income tax for the year in question. Diplock J. held that the judgment should be entered for the Crown for a sum of 20 without costs. The Court of Appeal substituted the judgment in favour of the Crown for 62 15s. The Court of Appeal thus added to the sum of 20 treble the tax on the amount which would have escaped taxation had a return made by the respondent formed the basis of assessment. The House of Lords reversed this decision holding that the Crown was entitled to the full amount claimed, namely, 20 and 418 14s. 6d. as fixed penalties, because giving the words of section 25(3)(a) their ordinary meaning, the phrase " treble the tax which he ought to be charged " meant " treble the whole tax which the taxpayer ought to be charged for the relevant year ". The underlying thought of the judgment of the Court of Appeal was that the penalty provisions produced minimum penalties wholly unrelated to the extent of the default, so extravagant as to be shocking in a penal provision, and at least one anomaly which might well be thought to run quite contrary to ordinary justice. Viscount Kilmuir, Lord Chancellor, said that he could not accept the argument that in the case of an incorrect return the amount of penalty to be levied was only a sum of 20 and treble the tax on the amount which would have escaped taxation if the incorrect return made by the assessee had formed the basis of assessment. In the opinion of the Lord Chancellor, " so to do would entail the making of an artificial assessment on the basis of the return, the making of the true assessment and the subtracting of the one from the other ". Lord Reid also examined the contention that the penalty must have been intended to have some relation to the offence and that the tax which the assessee ought to be charged must be additional tax which he ought to be charged by reason of the discovery of the true state of affairs ; otherwise the penalty could be grossly and extravagantly disproportionate to the offence. He considered the instance, where a man might be properly chargeable to 5,000 tax on his actual return and properly chargeable to 5,100 tax on the correct return. If the Crown was right the penalty would be 15,320; if the other view was right it would only be 320. Lord Reid, however, found it impossible to hold that the words " not exceeding 20 and treble the tax which he ought to be charged under this Act" as they appeared in the earlier taxing statutes had a limited meaning or that they were intended to be given a limited meaning in the consolidating Act of 1952.

10. It only remains to be considered as to what is the true import and meaning of the word "avoided" and the words "income as returned" in section 28(1). According to the appellant's submission "avoided" has to be read with reference to clause (c) as meaning "evaded". It is suggested that this word should be restricted to mean omission or default on the part of a person and should not be so construed as to being within its ambit mere escarpment of income. This argument was rejected by the High Court which referred to the meaning given in the Concise Oxford Dictionary and rightly

observed that the use of the word "avoided" has to be seen in the context in which it appears. When read with the words "income as returned" the word "avoided", in the view of the High Court, was used in the sense of "escaped". The submission on behalf of the appellant that avoiding of tax should be linked to the concealment of income has hardly any force. Even with regard to clause (b) the same amount of penalty can be imposed as in the case of clause (c). The learned Solicitor-General has drawn our attention to Chapter V-B containing special provisions relating to avoidance of liability to income-tax and super-tax. Sections 44D and 44F use the expressions "avoiding", "avoid" and "avoided" which cannot ordinarily have only the meaning of "evade", "evaded" or "evasion". In our opinion the High Court was right in holding that the word " avoided " does not mean " evaded " and that it has been used in the sense of escapement. To put it differently, the legislature wanted the income-tax authorities to determine what would have been the amount of tax that would have escaped assessment had the income as shown in the return been accepted as correct and 1 1/2 times of the said amount would be the maximum limit within which penalty can be imposed where it was discovered that income had been concealed. So far as the word " returned " is concerned, it is not possible to go beyond its plain meaning particularly when the expression " return " is well understood in income-tax law. Section 22 contains provisions relating to " return of income " and the words " income as returned" would clearly mean income as disclosed or shown in the return filed under section 22, Even in clause (a) of section 28(1) the word " return " has been used in the same sense and the submission of the counsel for the appellant that other meaning should be given to it cannot, by any stretch of reasoning, be accepted.

11. In the above view of the matter it must be held that the penalties which have been provided by section 28(1) are meant for the acts of omission or commission which are set our therein and once an assessee is proved to have been guilty of them the penal provisions are attracted and with reference to clause (c) irrespective of the amount concealed. Thus the answer returned by the High Court to the question referred was correct.

12. It has been strenuously urged before us that the imposition of the penalty of Rs. 62,000 in the present case was disproportionately high when compared with the amount of Rs. 20,000 in respect of which alone concealment had been found. The High Court shared this view but that is not a matter which can be gone into in view of the nature of the question which was referred.

13. The appeal consequently fails and it is dismissed but, in the circumstances, the parties are left to bear their own costs.

14. Appeal dismissed.