(1987) 09 AHC CK 0013

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 5587 of 1982

A.C. Nigam APPELLANT

Vs

Commissioner of Income Tax RESPONDENT

Date of Decision : 07-09-1987

Acts Referred:
Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 271(1), 273, 273A

Citation : (1988) 73 CTR 9 : (1989) 176 ITR 86

Hon'ble Judges : Brijesh Kumar, J;B.L. Loomba, J

Bench : Division Bench

Advocate : K.B. Jindal, for the Appellant; S.C. Misra, for the Respondent

Judgement

1. This writ petition is directed against the order dated March 30, 1982, passed by the Commissioner of Income Tax, Lucknow, rejecting the application moved by the petitioner u/s 273A of the Income Tax Act, 1961, for waiver of penalties and penal interest.

2. It appears that the petitioner had not submitted his Income Tax returns for the assessment years 1977-78, 1978-79 and 1979-80 at the appropriate time. He, however, submitted voluntary returns in respect of the assessment years mentioned above on July 31, 1980. The assessments were made by the Income Tax Officer on December 31, 1980. The assessment orders also provided for issue of notices u/s 271(1)(a) and Section 273(b) of the Income Tax Act for the three assessment years, namely, 1977-78, 1978-79 and 1979-80. The petitioner thereafter moved an application dated October 24, 1981, for waiver of penalty and interest on the ground that he had submitted returns voluntarily prior to the issue of notice and, therefore, was entitled for the benefit u/s 273A of the Income Tax Act. The application was rejected by the Commissioner of Income Tax as indicated earlier. A true copy of the order passed by the Commissioner of Income Tax has been filed as annexure-3 to the writ petition. The Commissioner of Income Tax has observed that enquiries were initiated on the basis of

information received from A.D.M. (Development) in July, 1978, informing that the petitioner had received commission under the National Savings Scheme, A notice was issued on the basis of the above information addressed to Sri S.C. Nigam, 20 Cantonment, Lucknow, on November 15, 1979. Admittedly, the name mentioned in the notice was incorrect. Therefore, the notice was not served. A fresh notice with the correct name as Sri A.C. Nigam was again issued on December 19, 1980, i.e., much after the voluntary returns submitted by the petitioner on July 31, 1980. The Commissioner of Income Tax found that the returns submitted by the petitioner can neither be said to be voluntary nor in good faith as they were filed only after the notice had been issued by the Income Tax Officer in the name of S.C. Nigam. In substance, therefore, the conclusion drawn by the Commissioner of Income Tax was that the notice issued in the name of Sri S.C. Nigam was sufficient notice.

3. Learned counsel for the petitioner has submitted that the notice issued in the name of S.C. Nigam was no notice in the eye of law and it also did not amount to issuance of notice unless it was served upon the petitioner. He has further submitted that the word "issued" has been interpreted by the hon''ble Supreme Court as "served" while interpreting a similar provision under the Wealth-tax Act and in this connection, he has placed reliance upon Commissioner of Wealth Tax, U.P. and Another Vs. Kundan Lal Behari Lal, , which shows that a similar provision u/s 18 of the Wealth-tax Act, 1957, as it then stood, provided for waiver or reduction of penalties in certain cases. It may be pointed out that new provisions of Sub-sections (2A) and (2B) of Section 18 have been incorporated in Section 18B by a subsequent amendment. It provided for waiver or reduction of penalty if, prior to the issue of notice, the assessee voluntarily and in good faith made full and true disclosure of his net wealth. Clause (a) of Sub-section (1) of Section 273A of the Income Tax Act also provides for reduction or waiver of penalty if the assessee submits the return voluntarily and in good faith prior to the issue of a notice u/s 139(2) of the Income Tax Act. The hon''ble Supreme Court has interpreted that "issue " of notice means "service" of notice. That being the position, we are of the view that the Commissioner of Income Tax erred in taking into account the notice which was issued in the name of Sri S.C. Nigam and which was admittedly not served upon the petitioner, while refusing to waive the penalty. The petitioner had submitted the returns voluntarily that is to say, not in response to any notice but prior to service of notice, which was served subsequent to the submission of the returns.

4. On behalf of the Department, learned counsel has submitted that reduction or waiver of the penalty is a discretionary matter and in case the Commissioner of Income Tax refused to reduce or waive penalty in his discretion, it does not call for any interference in proceedings under Article 226 of the Constitution of India. In this connection, learned counsel for the petitioner has placed reliance on certain cases to show that the discretion has to be exercised in a judicial manner. There is no dispute with the proposition. The discretion vested in an authority has to be exercised judicially taking into consideration the relevant facts. In the

present case, we find that the Commissioner of Income Tax has observed that the return was filed after notice has been issued in the name of S.C. Nigam. Besides, the fact that this notice was not served upon the petitioner, it was not issued in the name of the correct person. Therefore, even if the petitioner had not received the notice as allegedly reported by the process server, this would not be a circumstance against the petitioner. Therefore, the order of the Commissioner of Income Tax dated March 30, 1982, contained in annexure-3 to the petition is liable to be set aside and the matter will have to be reconsidered by the Commissioner of Income Tax in the light of the provisions contained u/s 273A of the Income Tax Act and the observations made in the judgment.

5. Learned counsel for the petitioner has also drawn our attention to the fact that the notice which was issued on December 19, 1980, and was served upon the petitioner was only in respect of the assessment year 1978-71), It was not in respect of the assessment of the other two assessment years, namely, 1977-78 and 1979-80. The learned Commissioner of Income Tax shall consider this aspect of the matter also while disposing of the matter afresh.

6. In the result, the writ petition is allowed and the order dated March 30, 1982, contained in annexure-3 to the writ petition is quashed. The Commissioner of Income Tax is directed to restore the petitioner''s application u/s 273A of the Income Tax Act and decide the same according to law.

7. There would, however, be no order as to costs.