
(2004) 02 BOM CK 0008

In the Bombay High Court

Case No : Writ Petition No. 3740 of 1994 25 February 2004

Anand B. Apte

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 25-02-2004

Acts Referred:

Income Tax Act, 1961 — Section 148, 273A

Citation : (2004) 136 TAXMAN 656

Hon'ble Judges : V.C. Daga, J; J.P. Devadhar, J

Bench : Full Bench

Advocate : S.N. Inamdar, for the Assessee R.V. Desai and P.S. Jetley, for the Revenue, for the Appellant;

Judgement

J.P. Devadhar, J.

In this Writ Petition, the petitioner has challenged the order dated 25-3-1994 passed by the Commissioner, Pune, declining to consider the application of the petitioner filed u/s 273A of the Income Tax Act, 1961 seeking waiver of penalty and interest levied against the petitioner for the assessment years 1981-82, 1984-85 and 1988-89.

2. The petitioner is the legal heir of late Smt. Kamlaben Apte, who was assessed to tax under the Income Tax Act. For the assessment years 1981-82 and 1984-85 to 1988-89 the returns of income were filed by the assessee voluntarily but belatedly. It was the case of Smt. Kamlaben that the returns could not be filed in time, because of the breakdown of the relationship with her three sons and at the relevant time the accounts were not maintained properly. The said returns of income were regularised by issue of notice u/s 148 of the Act and were accepted as correct and assessment orders were passed accordingly with penalty and interest for delay in filing the returns and delay in payment of advance tax.

3. On 1-11-1990 the said Smt. Kamlaben made an application to the

Commissioner u/s 273A of the Act seeking waiver or reduction of penalty and interest imposed upon her in respect of the aforesaid assessment years.

4. On the death of Smt. Kamlaben on 8-9-1991, the petitioner as her legal heir has pursued the application filed by her u/s 273A of the Act. By an ex parte order, the said application was disposed of. However, on a writ petition filed by the petitioner being Writ Petition No. 457 of 1993, the said ex parte order was set aside on 8-2-1993 and the Commissioner was directed to decide the matter afresh after hearing the petitioner. Thereupon, by the impugned order dated 25-3-1994, the Commissioner has rejected the claim of the petitioner on the ground that the requirements of section 273A of the Act were not met with viz. the returns filed were neither voluntary nor in good faith and, therefore, not eligible for any relief u/s 273A of the Act. Challenging the said order, the present petition has been filed.

5. Mr. S.N. Inamdar, learned advocate appearing on behalf of the petitioner submitted that on the date on which the returns were filed, no notice was issued to the assessee and there were no incriminating documents in possession of the assessing officer. He submitted that in the returns, the assessee had voluntarily and in good faith made full and true disclosure of her income and the same has been accepted by the assessing officer. He submitted that all the pre-conditions laid down in section 273A has been fulfilled and, therefore, the penalty and interest levied ought to have been waived. He submitted that the provisions of section 273A of the Act are in the nature of amnesty provisions, the object of which was to encourage defaulting taxpayers to come clean on their own, prior to the detection by the department and disclose the unassessed income and pay taxes thereof. He submitted that the provisions of section 273A of the Act comes into play only when the liability is established and if there is no case for imposition of penalty, then the said provision is not attracted at all. He submitted that the term "voluntarily" incorporated in section 273A of the Act has to be interpreted bearing in mind the object of the provision and the circumstances of the case. He submitted that the conclusion of the Commissioner that the returns were not filed voluntarily because the department had in its possession "information" in the form of audit query in the case of the partnership firm in which the assessee was a partner is wholly erroneous, because the alleged audit query was neither intimated to the assessee nor the audit party had any incriminating document against the assessee. The fact that the assessee was a partner of the firm was already known to the department. Accordingly, it was submitted that in view of the audit query raised in the case of the firm, it could not be said that the returns filed were not voluntary so as to decline waiver of penalty and interest u/s 273A of the Act.

6. Mr. Inamdar relied upon the judgment of the Apex Court in the case of Jaswant Rai and Another Vs. Central Board of Direct Taxes and Revenue and Others, and submitted that the principle condition for grant of relief u/s 273A is that the assessee should have voluntarily and in good faith made full disclosure

of her income prior to the detection of the same and such disclosure could be made even otherwise than in the course of a return by submitting a petition to the Commissioner. He submitted that in the present case, full and complete disclosure was made by the assessee by filing returns voluntarily and in good faith and the taxes payable thereon has been duly paid by the assessee before service of any notice upon the assessee and before detection of the same by the Income Tax authorities. Accordingly, he submitted that all the conditions of section 273A of the Act being satisfied, the Commissioner ought to have entertained the application made by the assessee.

7. Mr. R.V. Desai, learned senior advocate appearing on behalf of the respondents on the other hand submitted that in the present case, even though the returns were filed before the issue of notice, they were filed subsequent to the query raised by the audit party in respect of the firm in which the assessee was the partner. He submitted that the audit query was on 9-6-1989 and the returns for the years in question were filed on 24-7-1989. Accordingly, he submitted that the returns filed by the assessee being beyond time, the said returns were to be treated as non est returns and non est returns cannot be said to have been filed voluntarily and in good faith. He submitted that in the instant case, although the assessee has paid the taxes, the assessee has not paid interest and penalty levied under the Act. Therefore, the Commissioner was justified in holding that the conditions set out in section 273A have not been complied with. Accordingly, it was submitted that the Commissioner was justified in rejecting the application of the petitioner.

8. Mr. Desai, relied upon the judgment of this court in the case of *Saberaj Industries v. E.J. Bahadur, Commissioner* (1995) 217 ITR 831 in support of his contention. He submitted that as the assessee had requested the Income Tax Officer to treat the returns which were time-barred, to be returns in compliance with section 148 of the Act, it could not be said that the preconditions laid down by section 273A of the Act have been complied with and, therefore, the Commissioner was justified in rejecting the claim of the petitioner.

9. We have heard the counsel on both sides. In the present case, it is not in dispute that on the date on which returns were filed, no notice was issued to the assessee regarding non-filing of returns for the assessment years in question. It is also not in dispute that the disclosure of income made by the assessee has been accepted by the Income Tax authorities as full disclosure of income and the assessments have been made as per the returns filed by the assessee. The fact that the audit party had raised a query to the firm regarding the payments made by it to the assessee as a partner of the firm was not intimated to the assessee. As the assessee was not aware of any query, raised by the audit party, it could not be said that the returns filed by the assessee were not voluntary. It is not the case of the revenue that the assessee had suppressed the fact that she had a source of income from the firm. In fact, upto assessment year 1981-82, the assessee had filed returns from time to time by showing income received by her

from the firm. Therefore, in the facts of the present case, audit query raised to the firm cannot be said to have compelled the assessee to file returns, especially when the assessee was not even aware of such audit query raised against the firm. Where the income disclosed though belatedly is a full disclosure and the said disclosure has been made voluntarily and in good faith, then the penalty and interest leviable for late filing of return could be waived by the Commissioner u/s 273A of the Act. In the facts of the present case, we are of the opinion that the assessee had voluntarily and in good faith made full and true disclosure of her income and had also paid the taxes payable thereon. Non-payment of penalty and interest during the pendency of the application for waiver u/s 273A cannot be said to be non-cooperation on the part of the assessee. Therefore, in our opinion, the Commissioner was not justified in holding that the preconditions set out u/s 273A of the Act have not been fulfilled in the present case.

10. The decision of this court in the case of *Saberaj Industries (supra)* is distinguishable on facts. In that case, the contention of the assessee was that the Commissioner was in error in holding that the returns were filed in pursuance of notice u/s 148 of the Act, when in fact, the returns were filed, though belatedly, before the issuance of notice u/s 148 of the Act. In that context, referring to the letters addressed by the assessee in reply to the notices issued u/s 148 of the Act requesting the assessing officer to treat the returns which were time barred as returns in compliance with the notice u/s 148 of the Act, it was held that the Commissioner was justified in holding that the returns were filed in pursuance to notice u/s 148 of the Act. Accordingly, it was held that returns which were filed pursuant to the notice u/s 148 of the Act would not qualify for relief u/s 273A of the Act. The issue as to whether the disclosure made voluntarily even in belated returns could be considered for the purpose of section 273A of the Act, was neither raised nor considered in that case. In the present case, the issue required to be considered is whether the disclosure made by the assessee voluntarily in the belated returns could be considered for the purpose of section 273A of the Act. The Apex Court in the case of *Jaswant Rai (supra)* has held that the disclosure could be made by filing a return or by submitting a petition to the Commissioner. Thus, what is relevant for section 273A is the full and true disclosure made voluntarily and in good faith and if such a disclosure is made through the belated returns it does not cease to be a voluntary disclosure. If the disclosure made in the belated returns are voluntary and in good faith and are accepted, then the application for waiver u/s 273A of the Act cannot be rejected on the ground that there is no voluntary disclosure. The contention of the revenue in its affidavit in reply that the belated return is a non est return and the non est return cannot be said to be filed voluntarily is without any merit, because, firstly, that was not the ground on which the impugned order has been passed and it is settled law that the validity of an order is to be tested on the basis of the reasons contained in the order and not on the basis of the reasons set out in the affidavit in reply and secondly, u/s 273A of the Act, for waiver of penalty and interest what is relevant is the full and true disclosure made

voluntarily in good faith, whether by way of belated returns or otherwise.

11. In this view of the matter, we quash and set aside the order of the Commissioner passed u/s 273A of the Act on 25-3-1994 and remand the matter back to the Commissioner to decide the application regarding reduction or waiver of penalty and interest on merits on the footing that all the preconditions for grant or waiver of penalty and interest contemplated u/s 273A of the Act are complied with by the assessee.

12. Petition is allowed in above terms. Rule is made absolute in terms of prayer clause (a). However in the facts and circumstances of the case, there shall be no order as to costs.