

(1979) 11 DEL CK 0004

In the Delhi High Court

Case No : Income-tax Reference No. 57 of 1971

Avtar Krishan Dass

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 14-11-1979

Acts Referred:

Citation : (1982) 133 ITR 338

Hon'ble Judges : S. Ranganathan, J;D.R. Khanna, J

Bench : Division Bench

Advocate : Non, for the Appellant; M.L. Verma, for the Respondent

Judgement

S. Ranganathan, J.—The following questions have been referred for our decision u/s 256(1) of the I.T. Act, 1961 :

"(1) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was justified in holding that there was no sufficient cause which prevented the assessed from filing the appeals within time ?"

(2) Whether, on the facts and in the circumstances of the case, the Tribunal is justified in not admitting the appeals and in dismissing the same as barred by time ?"

2. It is necessary to state a few facts. The assessment years are 1955-56 and 1957-58. On December 21, 1966, the IAC passed orders u/s 271(1)(c) of the I.T. Act, 1961, imposing penalties of Rs. 5,000 and Rs. 4,000, respectively, on the assessed for the above two assessment years. At the end of his order, the IAC directed the ITO to issue necessary demand notices and challans and collect the amount of penalty. In pursuance of the order of the IAC, the ITO issued notices of demand on the same date and these were duly served on the assessed. Paragraph 7 of the demand notice was in the following terms :

" 7. If you intend to appeal against the penalty u/s 271(1)(c)/interest payable u/s 216 you may present an appeal under Part A of Chapter XX of the Income Tax

Act, 1961, to the Appellate Assistant Commissioner of Income Tax, G-Range, within thirty days of the receipt of this notice in the form prescribed u/s 249(1) of the said Act, duly stamped and verified as laid down in that form,"

3. It appears that when these notices of demand were received the asses-see filed appeals against the orders of penalty before the AAC, C-Range, within the period mentioned in the demand notices. These appeals came up for hearing on December 4, 1967, when it was pointed out that the appeal against the penalty order had to be preferred not to the AAC but to the Appellate Tribunal. Thereupon, the assessed obtained the return of the memoranda of appeal filed before the AAC on December 5, 1967, and presented the appeals before the Tribunal on December 5, 1967, itself with applications for condensation of delay. It was submitted that the delay in filing the appeals was due to sufficient cause and that the same should be condoned.

4. The Tribunal, however, declined to condone the delay by its orders dated April 29, 1969. The Tribunal pointed out that the delay in filing the appeals was on account of professional incompetence and negligence. After referring to the decisions in *Highton v. Treherne* [1878] 39 LT 411, *Surendra Mohan Rai Choudhury Vs. Mohendra Nath Banerjee and Others*, and *Bijuboo Vs. Rajaballi Tayaballi*, the Tribunal held that they were not satisfied that there was sufficient cause for the inordinate delay in the preferring of the appeals against the orders of the IAC. They, Therefore, dismissed the appeals as barred by time.

5. At the request of the assessed, the two questions set out earlier have been referred for the decision of this court. Though the reference has been listed for a number of days, there is no appearance on behalf of the assessed. We have, Therefore, heard Mr. M. L. Verma, learned counsel for the department, who has placed before us all the necessary facts and also presented the case with fairness and equity.

6. The Supreme Court recently had occasion to consider a similar position in the case of *Concord of India Insurance Co. Ltd. Vs. Smt. Nirmala Devi and Others*, . In that case the counsel for the petitioner had made a mistake in the calculation of the period of limitation, with the result that the petitioner was misled into instituting the appeal late. The High Court dismissed the appeal on the ground that the lawyer's ignorance of law was no ground for condensation of delay u/s 5 of the Limitation Act, 1963. The Supreme Court held that there is no particular reason why, when a company or other person retains a lawyer to advise it or him on legal affairs, reliance should not be placed on such counsel. But if there is a gross delay too patent even for layman or if there is incomprehensible indifference, the "shield of legal opinion may still be vulnerable. The correct legal position, the court pointed out, had been laid down earlier in *State of Kerala Vs. Krishna Kurup Madhava Kurup*, , in the following words (p. 510 of 118 ITR):

" "The law is settled that mistake of counsel may in certain circumstances be taken into account in condoning delay, although there is no general proposition

that mistake of counsel by itself is always a sufficient ground. It is always a question whether the mistake was bona fide or was merely a device to cover an ulterior purpose such as laches on the part of the litigant or an attempt to save limitation in an underhand way. The High Court unfortunately never considered the matter from this angle. If it had, it would have seen quite clearly that there was no attempt to avoid the Limitation Act but rather to follow it albeit on a wrong reading of the situation." "

7. Looking at the facts of the present case in the light of the above principle, we are of the opinion that the Tribunal erred in rejecting the appeal on the general ground of the negligence of the counsel. All the relevant facts, had to be appreciated in the context of which the delay occurred in the present case. Under the Indian I.T. Act, 1922, the penalty was imposed by the ITO and from the order of penalty there was an appeal to the AAC. Actually this explains the terms of the notice of demand, which, in the present case, appears to have been sent to the assessed without the necessary modifications consequent on the amendments of the law. Though a reference to Section 271(1)(c) of the I.T. Act, 1961, is made in the notice of demand, it nevertheless requires the assessed to prefer an appeal to the AAC without adverting to new provisions, which require that where the minimum penalty exceeded a particular limit the penalty order had to be passed by the IAC and an appeal there from preferred to the Appellate Tribunal. Having regard, to the changes in law and terms of the demand notices, it is perhaps explicable that the assessed should have filed the appeal before the AAC. There was, of course, a certain amount of inadvertence on the part of the assessed but, as pointed out by the Supreme Court, the question is : whether the mistake was bona fide or was merely a device to cover an ulterior purpose. In the present case, the bona fides of the assessed are shown by the fact that he filed an appeal before the AAC within time and that as soon as the mistake was realised, the appeal before the Tribunal was filed without further delay. Having regard to these circumstances and the position as laid down by the Supreme Court, we are of opinion that the delay in the filing of the appeal should have been condoned by the Tribunal. We, Therefore, think that the answer to the questions must be in the negative and in favor of the assessed.

8. Mr. M. L. Verma, learned counsel for the department, submitted that since in the present case, the assessed has not cared to appear and prosecute the reference we should return the reference unanswered. There is no doubt some force in this submission. It has been held that the court has a discretion to return the question unanswered when there is no appearance on behalf of the assessed. But this is a discretion vested in the court. The question in this reference is a very short one and in the interests of justice we do not think it would be correct to return the question unanswered although the assessed has not appeared before us.

9. For the reasons mentioned above, we answer the reference as stated already. There will be no order as to costs.

D.R. Khanna, J.

10. I would only like to add that had the assessed taken care to peruse the provisions contained in Section 253(l)(b) of the I.T. Act, 1961, it should have been plain that an appeal against an order of the IAC made u/s 274(2) of the Act was maintainable before the Appellate Tribunal. An act is said to be done in good faith when it is done with due care and attention. In the ordinary course, Therefore, the assessed did not deserve any latitude for pursuing the appeal before the AAC when the position of the law was so patent. As observed in the case of *Highton v. Treherne* [1878] 39 LT 411, where there has been negligence or ignorance or gross want of skill of the legal adviser, the suitor must seek his remedy against the legal adviser and, in the meanwhile, must suffer so far as the limitation aspect is concerned. However, where the position of law is such that even a skilled person might have made a mistake, the rights of the client should not be forfeited.

11. The confusion that was created in the present case was by the demand notice which the ITO issued in pursuance of the penalty orders. It was mentioned in the notice that if the assessed felt aggrieved by the penalty orders made u/s 271(1)(c) of the Act, he could file appeals before the AAC. The assessed was thus plainly misled, though it could also be said that had he exercised greater diligence he could have discovered that the proper forum before which the appeal could lie was the Appellate Tribunal. Since the confusion was not entirely the making of the assessed and the blame should as well, to an extent, go to the ITO, I agree that the delay in the present case deserved to be condoned.