(1992) 09 BOM CK 0067

In the Bombay High Court

Case No : IT Reference No. 37 of 1988

Bombay Pipe Traders	APPELLANT
Vs	
Commissioner of Income Tax	RESPONDENT

Date of Decision : 22-09-1992

Acts Referred:

Constitution of India, 1950 — Article 141
Income Tax Act, 1961 — Section 139, 139(1), 148, 182, 183

Citation : (1995) 79 TAXMAN 363

Hon'ble Judges : V.A. Mohta, J;B.P. Saraf, J

Bench : Division Bench

Advocate : L.S. Dewani, for the Appellant; P.N. Chandurkar, Smt. Chandurkar and Smt. Wandile, for the Respondent

Judgement

V.A. Mohta, J.—At the instance of the assessee, following question is referred to this Court u/s 256(1) of the income tax Act, 1961 (''the Act''): "In the case of a registered firm, when it is found that the firm was not prevented by reasonable cause from filing its return of income in time, whether the penalty u/s 271(1)(a) of the income tax Act should be levied as directed in section 271(2) of the income tax Act, even when the assessee is not liable to pay tax as a registered firm after considering the advance tax paid by it in the status of a registered firm?"

The status of the assessee is a registered partnership firm. Relevant assessment year is 1973-74. The advance tax paid in time by the assessee was more than the "assessed tax'', but it filed the return of the income beyond time permitted u/s 139(1) of the Act. The ITO imposed penalty u/s 271(1)(a)(i) of the Act for the delayed return. The AAC allowed appeal of the assessee and set aside the order of penalty. The Tribunal allowed the appeal filed by the revenue restoring the order of the ITO.

2. In our judgment, having regard to the provisions of sub-section (1)(a)(i) and sub-section (2) of section 271, no penalty was leviable. Under the circumstances,

the answer to the question ought to be in the negative and in favour of the assessee.

3. But, following three Bombay High Court decisions seems to have struck a different note :

(1) Commissioner of Income Tax, Poona Vs. Janata Trading Co.,

(2) Commissioner of Income Tax Vs. N.G.K. Electrical Industries,

(3) Commissioner of Income Tax, Bombay City-VIII, Bombay Vs. Govindram and Company, .

With great respect, we are unable to persuade ourselves to accept the interpretation put up on the material provisions in those cases and hence judicial discipline demands reference of this question to a Full Bench. Here are our reasons.

4. We begin with reproduction of material portion of section 271 as it stood at the material time :

"271. Failure to furnish returns, comply with notices, concealment of income, etc. -(1) If the income tax Officer or the Appellate Assistant Commissioner in the course of any proceedings under this Act, is satisfied that any person-

(a) has failed to furnish the return of total income which he was required to furnish under sub-section (1) of section 139 or by notice given under sub-section (2) of section 139 or section 148 or has failed to furnish it within the time allowed and in the manner required by sub-section (1) of section 139 or by such notice, as the case may be, or

(b) and (c) ******

he may direct that such person shall pay by way of penalty,-

(i) in the cases referred to in clause (a), in addition to the amount of the tax, if any, payable by him, a sum equal to two per cent of the assessed tax for every month during which the default continued, but exceeding the aggregate of fifty per cent of the assessed tax.

Explanation - In this clause ''assessed tax'' means tax as reduced by the sum, if any, deducted at source under Chapter XVIIB or paid in advance under Chapter XVIIC

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(2) When the person liable to penalty is a registered firm or an unregistered firm which has been assessed under clause (b) of section 183, then, notwithstanding anything contained in the other provisions of this Act, the penalty imposable under sub-section (1) shall be the same amount as would be imposable on that firm if that firm were an unregistered firm."

5. In case of default enumerated in clause (a) a taxpayer can be directed to pay penalty, in addition to the amount of tax, if any payable by him, a sum equal to two per cent of the ''assessed tax'' - a term to which is given special meaning for the purposes of section 271(1)(a) by the Explanation. It means tax as reduced by the sum deducted at source under Chapter XVII-B or paid in advance under Chapter XVII-C. Clauses (a) and (i) of section 271(1) will have to be read adjunctively to find out the persons obliged to pay penalty and so also the measure of penalty. Measure of penalty is the ''assessed tax''. If ''assessed tax'' is zero, the amount of imposable penalty would be nil and therefore, it cannot be levied. Given the reasonable meaning to the provision, it appears that the scheme is that a taxpayer as liable to pay penalty only if he commits double defaults-(i) fails to submit a return without reasonable cause etc. and (ii) does not pay up his tax in the manner provided in clause (i) of section 271(1). A person who has had no arrears of taxes because of payment in advance under Chapter XVII-C is exempted by law from penalty payable for not filling return u/s 139(1) in time. After all, purpose of imposing penalty is to prevent evasion of tax by making the penal provisions deterrent to evasion.

6. So far there does not seem to be much difficulty. Difficulty arises, it is stated on behalf of the Revenue, when we look at sub-section (2) of section 271. The Revenue''s contention is that section 271(2) overrides section 271(1) and in case the defaulter under clause (a) is a registered firm, its case automatically falls under sub-section (2), as a result/the registered firm is to be treated as an unregistered firm and since the tax liability of an unregistered firm is higher, some tax would certainly be due and tax payable would in that case not be zero. It is difficult to accept this submission, since it would be incorrect approach for interpreting the penal provision. For ascertainment of liability to pay penalty one will have to look to sub-section (1) of section 271. This sub-section refers to ''person'' which would include even a registered firm. It would not be proper to straightway jump to sub-section (2) over sub-section (1). It is pertinent to notice that non obstante clause is placed in the middle and not in the beginning of sub-section (2). Sub-section (2) merely empowers the authority to treat a registered firm as if it were an unregistered for the purposes of quantifying the imposable penalty notwithstanding any other provisions like sections 182 and 183. In the absence of such a clause, the Revenue could have treated a registered firm as if it was an unregistered one even for quantification of penalty.

7. Thus, it seems that sub-section (2) is meant only for quantification of the penalty when it is imposable under sub-section (i) and not otherwise It is not necessary to go to sub-section (2) for the purpose of deciding whether the taxpayer was liable for penalty or not. in this context it is pertinent to notice that sub-section (2) is attracted only in case the tax-payer is a registered firm and not otherwise. Language of the provision. does not call for discriminating between varieties of taxpayers in the matter of liability to pay penalty. Even if there arises any doubt in this interpretation, its benefit, must go to the taxpayer.

8. The Supreme Court had an occasion to deal with similar situation in relation to liability to pay interest in accordance with sub-section (8) of section 139 for late filing of the return by a registered firm, in the case of Ganesh Dass Sreeram Vs. Income Tax Officer, ''A'' Ward, Shillong and Others, . It observed:

"Before we part with these appeals, we think we should clarify one situation, namely, where the advance tax duly paid covers the entire amount of tax assessed, there is no question of charging the registered firm with interest even though the return is filed by it beyond the time allowed, regard being had to the fact that payment of interest is only compensatory in nature. As the entire amount of tax is paid by way of advance tax, the question of payment of any compensation does not arise."

9. As rightly held by the Rajasthan High Court in the case of Commissioner of Income Tax Vs. Builders Engineers Co., , there is no reason to apply different principle to the question of penalty taking into consideration nearly similar language employed in sub-section (8) of section 139.

10. We may mention that even before the decision of the Supreme Court, the Andhra Pradesh High Court in the case of P. Venkata Krishnayya Naidu and Sons Vs. Commissioner of Income Tax, Andhra Pradesh, Hyderabad, had taken a view that penalty for filing late return is not imposable on a registered firm in case advance tax paid is equal to or more than the tax assessed and SLP directed against the said judgment has been dismissed by the Supreme Court [See: 189 ITR (Statute) 117].

11. The Punjab and Haryana High Court has also concurred with the above view of the Rajasthan High Court in the case of Commissioner of Income Tax Vs. Harish Chand and Co., . We may, however, notice that the Madhya Pradesh High Court in the case of KALURAM LADHARAM Vs. COMISSIONER OF Income Tax., has not applied the ratio of Ganesh Dass Sreeram''s case (supra) to a case of penalty and has struck to its earlier view that in view of sub section (2) of section 271, a registered firm is liable to pay penalty even if had no ''assessed tax'' in terms of the Explanation to section 271(1).

12. That, before Ganesh Dass Sreeram there has been divergence of views in different High Courts is too well known to be noticed. Reference to all of these is not necessary at this stage.

13. This takes us to three Bombay High Court cases referred earlier, taking a contrary view. The first case of Janata Trading Co.''s case (supra) is somewhat different on facts. The tax payable by the registered firm was not nil even after making payment of advance tax. In the second case of N.G.K. Electrical Industries ''case (supra), there was no contest in view of Janata Trading Co. ''s case (supra). In the third case of Govindram & Co. ''s case (supra) the above two decisions have been followed. Definite view about the provisions has been taken in these cases and since for the reasons indicated earlier, we are unable to agree with the same, reference to Full Bench is necessary.

14. At one stage it was submitted before us on behalf of the assessee that reference to Full Bench is not necessary in view of (i) dismissal of SLP against the decision of Andhra Pradesh High Court in the case of P.V.K. Naidu & Sons (supra) and (ii) decision of the Supreme Court in the case of Ganesh Dass Sreeram (supra). We do not think it would be proper to follow that course in the interest of certainty and avoiding multiplicity of proceedings. We are informed that different Tribunals are taking contrary views on the question of applicability of ratio of Ganesh Dass Sreeram''s (supra) in the cases of penalties. Non-speaking order of dismissal of SLP by the Supreme Court may not be "law declared" under Article 141 of the Constitution. The question is thus referred to Full Bench. The papers be placed forthwith before the Hon''ble Chief Justice for appropriate orders in the matter.

No costs.

