

(1978) 11 PAT CK 0003

In the Patna High Court

Case No : Taxation Case No's. 6 and 7 of 1975

Commissioner of Income Tax

APPELLANT

Vs

A. Rahman

RESPONDENT

Date of Decision : 28-11-1978

Acts Referred:

Finance Act, 1968 — Section 148, 271
Income Tax Act, 1961 — Section 271(1)

Citation : (1979) 10 CTR 309 : (1979) 119 ITR 475

Hon'ble Judges : S.K. Choudhuri, J;S. Sarwar Ali, J

Bench : Division Bench

Advocate : B.P. Rajgarhia and S.K. Sharan, for the Appellant; K.N. Jain, V.D. Narayan, Shambhu Sharan and S.K. Narayan, for the Respondent

Judgement

S.K. Choudhuri, J.—In these two tax cases a common question of law has been referred to this court by the Income Tax Tribunal, " B" Bench, Patna, and as such this judgment will govern both the cases. The question of law referred is in the following terms :

" Whether, on the facts and in the circumstances of these cases, the Tribunal was justified in reducing the quantum of penalties u/s 271(1)(c) of the Act to 20% of the tax sought to be evaded by applying the law which was in force before 1-4-1968 ?"

2. The relevant facts are these :

3. The assessment years in the two tax cases are 1965-66 and 1966-67, respectively. The returns in both the cases were filed on March 1, 1967, showing an income of Rs. 1,500. The ITO estimated the income at Rs. 4,900 for each of the assessment years and completed the assessment by order dated June 26, 1969. On that very day, the ITO was of the opinion from the statement of account of the assessee with the Punjab National Bank that an amount of Rs. 79,146 in the case relating to the assessment year 1965-66 and Rs. 96,181 in

the other case relating to the assessment year 1966-67 had escaped assessment besides bank interest of Rs. 65 in one case and Rs. 285 in the other case which were also not disclosed. Accordingly, a notice u/s 148 of the I.T. Act, 1961 (hereinafter to be called as " the Act "). was issued. In response to the said notice the assessee filed a return declaring an income of Rs. 11,294 in one case and Rs. 13,176 in the other. The ITO on the basis of this return computed the assessment at a figure of Rs. 12,091 and Rs. 14,145 for the aforesaid two years respectively. The net profit, therefore, calculated on those figures at the rate of 9% on the escaped income came to Rs. 7,125 in one case and Rs. 8,657 in the other. Thus, the ITO held that the income which was concealed by the assessee from his original return comes to Rs. 7,191 (that is, Rs. 7,125 plus Rs. 66) and in the other comes to Rs. 8,945 (that is, Rs. 8,657 plus Rs. 288). It is in respect of these amounts relating to the assessment years 1965-66 and 1966-67 that penal proceedings were initiated by the ITO u/s 271(1)(c) of the Act on the ground that the assessee did not disclose one of the sources of his income, namely, from supply business with Telco Ltd. at the time of the original assessment. As the returned income was found to be less than 80% of the assessed income and the minimum penalty imposable exceeded Rs. 1,000, the ITO referred the matter to the IAC under the Act.

4. The IAC did not accept the stand taken by the assessee that there was an omission on his part to disclose the respective figures in the two cases by mistake and that he voluntarily disclosed the same by a petition filed on November 27, 1967. For reasons recorded by the. IAC, this plea of the assessee was rejected. He held that the assessee concealed his income from the supply business as also interest on a bank deposit and accordingly imposed penalty. As the returns were filed in pursuance of the notice u/s 148 after April 1, 1968, the IAC was of the opinion that penalty was imposable under the amended law as it stood then. Accordingly, he imposed a penalty equal to the income concealed in each case by separate orders.

5. Being aggrieved the assessee moved the Tribunal, Patna, by preferring two appeals. I may state here that there was also a penal proceeding for the assessment year 1968-69 and as penalty was also imposed for that year the assessee filed another appeal. All the three appeals were heard by the Tribunal and disposed of by a common judgment. We are not concerned with the penalty for assessment year 1968-69, as it was held by the Tribunal that no penalty was imposable for that assessment year. However, for the other two years with which we are concerned, in the two tax cases, the Tribunal held that when the original returns relating to the assessment years in question were filed before April 1, 1968, the law was that the penalty was to be imposed at a sum which should not be less than 20% but which should not exceed one and half times the amount of the tax, if any, which would have been avoided if the income as returned by such person had been accepted as the correct income. Considering the circumstances that the assessee co-operated with the department, the Tribunal imposed a minimum penalty for each of the two assessment years in question by applying

the aforesaid law that was in force at the time of filing the original returns.

6. Being aggrieved by the decision of the Tribunal, the CIT moved the Tribunal u/s 256(1) of the Act for making a reference to the High Court in each of the two cases. Accordingly, the aforesaid question already quoted at the beginning of the judgment has been referred for decision of this court.

7. Mr. B P. Rajgarhia, learned counsel appearing for the department vehemently contended that the Tribunal was wrong in applying the law as it existed at the time of filing of the original returns by the assessee as the relevant date for application of the law would be the date when the authority concerned was satisfied in the course of the proceedings under the Act that the assessee had concealed his income and this date would be the date after the law was amended and, therefore, the order of the IAC was correct.

8. Mr. K. N. Jain, learned counsel for the assessee, on the other hand supported the order of the Tribunal and contended that the law applicable would be the law as it existed at the time of filing of the original return by the assessee. According to the learned counsel it is with reference to the said original return that the assessee has committed concealment or default within the meaning of Section 271(1)(c) of the Act and, therefore, the Tribunal's order is correct and cannot be interfered with.

9. Mr. Rajgarhia in support of his contention strongly relied upon the Supreme Court decision in Jain Bros. and Others Vs. The Union of India (UOI) and Others, . He contended that this decision is a settler on the point and, therefore, all the decisions which have been decided otherwise would be taken to have been wrongly decided as in this case the true scope of the Supreme Court decision was not appreciated. Learned counsel referred to only one paragraph from the Supreme Court decision without reference to the context which reads thus (p. 116) :

" It is well settled that in fiscal enactments the Legislature has a larger discretion in the matter of classification so long as there is no departure from the rule that persons included in a class are not singled out for special treatment. It is not possible to say that while applying the penalty provisions contained in the Act of 1961 to cases of persons whose assessments are completed after 1st April, 1962, any class has been singled out for special treatment. It is obvious that for the imposition of penalty it is not the assessment year or the date of the filing of the return which is important but it is the satisfaction of the Income Tax authorities that a default has been committed by the assessee which would attract the provisions relating to penalty. Whatever stage at which the satisfaction is reached, the scheme of sections 274(1) and 275 of the Act of 1961, is that the order imposing penalty must be made after the completion of the assessment. The crucial date, therefore, for purposes of penalty, is the date of such completion."

10. In order to appreciate the true scope of the above-quoted paragraph from

the Supreme Court decision it is necessary to point out as to in what context those sentences have been said. The facts in short in the Supreme Court decision were as follows. Appellant No. 1 before the Supreme Court was a registered firm of which the partners were appellants Nos, 2 to 5. On May 26, 1960, a notice was served u/s 22(2) of the Indian I.T. Act, 1922, for filing the return for the assessment year 1960-61. This return was not filed within 35 days and, therefore, further notices were served on two occasions. Ultimately, a return was filed on November 18, 1961. The ITO completed the assessment on November 23, 1964, by increasing the total income in the figure returned. In view of the amendment in Section 23(5) of the Act of 1922, by the Finance Act of 1956, the tax payable by the firm and the amount to be included in the income of each partner was determined and on the same day the ITO issued notice u/s 271 read with Section 274 of the Act of 1961 calling upon the firm to show cause as to why the order imposing penalty should not be passed on account of failure to furnish a return within time. After the reply to the "show-cause notice" was filed the ITO by order, dated November 19, 1966, imposed a penalty of Rs. 1,03,434 u/s 271(1)(a) of the Act of 1961 for non-compliance of the notice u/s 22(2) of the Act of 1922. The appellant took the matter in appeal before the IAC challenging the imposition of penalty. Although those proceedings were still pending in a writ petition in the High Court challenging, inter alia, the validity and constitutionality of Section 23(5) of the Act of 1922 and Section 297(2)(g) and Section 271(2) of the Act of 1961, respectively, the High Court did not accept any of the contentions of the appellants and the petition was dismissed. In the first part of the judgment, their Lordships of the Supreme Court dealt with the attack against Section 23(5) of the 1922 Act on the ground that the authority cannot tax the subject twice over to the same tax. This argument was not accepted. Thereafter, their Lordships entered into the question of constitutional validity of Section 297(2)(g) of the Act of 1961. Their Lordships, after quoting Clauses. (f) and (g) of Sub-section (2) of Section 297, which section is a repealed and saving provision, discussed the submission of the appellant about Clause (g) of that section being violative of Article 14 inasmuch as it creates discrimination between two sets of assessees with reference to a particular date, namely, completion of assessment proceeding on or after the 1st April, 1962. This argument, after elaborate discussion, was not accepted. From the fact stated in the Supreme Court decision, it is clear that the case related to the imposition of penalty in relation to the assessment year 1960-61, the assessment of which was completed on November 23, 1964, i.e, a date after the 1st April, 1962. For such a case a clear provision has been made in Section 297(2)(g).

11. The said two Clauses, of Sub-section (2) of Section 297 has been quoted in the Supreme Court decision and read thus:

"Notwithstanding the repeal of the Indian Income Tax Act, 1922 (XI of 1922) (hereinafter referred to be as the repealed Act),--....

(f) any proceeding for the imposition of a penalty in respect of any assessment completed before the 1st day of April, 1962, may be initiated and any such penalty may be imposed as if this Act had not been passed;

(g) any proceeding for the imposition of a penalty in respect of any assessment for the year ending on the 31st day of March, 1962, or any earlier year, which is completed on or after the 1st day of April, 1962, may be initiated and any such penalty may be imposed under this Act."

12. Thus, on a plain reading of the aforesaid two clauses it is manifest that they are dealing with the initiation of a penalty proceeding in relation to any assessment completed before the 1st day of April, 1962, under Clause (f) and on or after 1st day of April, 1962, under Clause (g). These two clauses clearly show that the initiation of penalty proceeding and the imposition of penalty have to be made in relation to the assessment completed before April 1, 1962, according to Clause (f) under the old Act and in relation to the assessment completed on or after April 1, 1962, according to clause (g) under the new Act. Thus, these two clauses make special provisions as to the applicability of the law relating to initiation and imposition of penalty depending upon the date of completion of assessment. On reading Jain Bros. and Others Vs. The Union of India (UOI) and Others, , as a whole it is clear that it was a case squarely covered by Section 297(2)(g). It can also be said without the least hesitation that the paragraph relied on from Jain Bros. and Others Vs. The Union of India (UOI) and Others, by Mr. Rajgarhia does not lay down the general proposition applicable even to cases not covered by clauses. (f) and (g) of Section 297. To read the said decision in that way would amount to misreading the same. That paragraph itself shows that it was a case where assessment was completed after 1st April, 1962, and I have already pointed out that the relevant assessment year was 1960-61. It is well settled that a decision must be read against the background of its essential facts. Thus, the proposition laid down in the said paragraph in Jain Bros. and Others Vs. The Union of India (UOI) and Others, does not bear on the facts of the present case and, therefore, the contention of Mr. Rajgarhia cannot be accepted.

13. The point for decision in this case is as to whether the Tribunal was correct in applying the law as it was before the amendment made by the Finance Act of 1968 with effect from April 1, 1968, in Clause (iii) of Section 271(1)(c) in assessing the penalty in relation to the assessment years of 1965-66 and 1966-67. I may state here that this was not the question involved in Jain Bros. and Others Vs. The Union of India (UOI) and Others, . . The section as it stood before the amendment and after the amendment is necessary to be quoted for proper appreciation.

Before amendment

"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.....

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income,

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

"(iii) in the cases referred to in clause (c), in addition to any tax payable by him, a sum which shall not be less than twenty per cent, but which shall not exceed one and a half times the amount of the tax, if any, which would have been avoided if the income as returned by such person had been accepted as the correct income....."

After amendment

"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--.....

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income,

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

(iii) in the cases referred to in clause (c), in addition to any tax payable by him, a sum which shall not be less than, but which shall not exceed twice, the amount of the income in respect of which the particulars have been concealed or inaccurate particulars have been furnished....."

14. Thus, we find from the aforesaid amendment that the quantum of penalty both maximum and minimum has been increased by such amendment. Rest of the provisions remain the same. On perusing the provisions it is manifest that the ITO or the AAC if satisfied in the course of any proceeding under the Act that any person has concealed the particulars of his income or has furnished inaccurate particulars of such income then he has the power to draw a penalty proceeding and impose penalty as mentioned in the aforesaid provisions. If the old law applies then the penalty will be lesser but under the new law the penalty will be much more. The question, therefore, is as to when concealment has been made in the present case under consideration. I have already pointed out above that the original returns in both the cases were filed on March 1, 1967, that is, before the aforesaid amendment, I have already pointed out above while stating the facts of the case that on the date assessment was completed on the basis of the original returns notice u/s 148 was issued to the assessee. It cannot be disputed that it is in relation to these returns that penalty has been imposed. So far as the tax is concerned it also cannot be disputed that the law is that it has to be assessed for an assessment year according to the law as it stands on the 1st day of April of the relevant financial year and any amendment made in the Act after that date would not apply to the assessment of that year even if actually assessment was made after the amendment had come into force. Applicability of the law to the penalty proceeding would ordinarily be governed by the law when concealment of the income within the meaning of Clause (c) of Section 271(1) of

the Act was made. It necessarily poses the question as to when this concealment was made and with reference to which return. It cannot be disputed that the concealment was made at the time when original returns for the two relevant assessment years were filed. This date is much before April 1, 1968, the date when the amendment came into force under which the quantum of penalty has been increased. Therefore, in my opinion, the law as it stood before amendment would apply. It is true that the Legislature has power to apply the new law retrospectively but in the amendment there is no such word or language used from which it could be gathered that the amended provision has been made applicable to the concealment of particulars of the income which necessarily has to be determined with reference to the original returns filed. It will also be correct to hold that the amended law has no application as to the imposition of penalty in relation to the relevant assessment years which is directly related to the act of concealment and the material for the purpose of such concealment would be with reference to the original returns filed and, therefore, the law as it stood on the date when the original returns were filed would govern the penalty proceeding. The provision for imposing the penalty, also, in my opinion, being substantive law cannot have retrospective effect unless expressly stated by the Legislature to be so applicable. Mr. Jain pointed out the dictum laid down in the Supreme Court decision in the case of Govind Das and Others Vs. The Income Tax Officer and Another, . The headnote reads thus :

" It is a well settled rule of interpretation that unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability otherwise than as regards matters of procedure. If the enactment is expressly in language which is fairly capable of either interpretation, it ought to be construed as prospective only."

15. The conclusion that I have arrived at is also supported by various decisions of different High Courts. It will be sufficient for me to make a reference to some of them which were cited at the Bar. They are Addl. Commissioner of Income Tax Vs. Medisetty Ramarao, , Addl. Commissioner of Income Tax Vs. Krishna Subh Karan, , Commissioner of Income Tax Vs. Ramchand Kundanlal Saraf, and Commissioner of Income Tax Vs. Ram Achal Ram Sewak, . There are other decisions apart from those mentioned above which are referred to in Addl. Commissioner of Income Tax Vs. Medisetty Ramarao, .

16. It is, however, necessary here to discuss one decision which was again strongly relied upon by Mr. Rajgarhia in support of his contention. It is Commissioner of Income Tax Vs. K.C. Behera and Others, , a Bench decision of the Orissa High Court. It appears that it has struck a different note from the decisions referred to above. On reading this decision it appears, that the learned judgts have followed the decision in Jain Bros. and Others Vs. The Union of India (UOI) and Others, and have strongly relied upon a portion of the paragraph, quotation of which, I have already made above while discussing that case at the

beginning of the judgment. With reference to that paragraph it has been stated I "the aforesaid observation of their Lordships left absolutely no room for doubt that the penalty proceeding has to be initiated only on the completion of the assessment when the assessing authority would have the satisfaction that the assessee had concealed the income which had escaped assessment". Apart from that, the facts of this case are also different. In this case, the relevant assessment year was 1960-61 and assessment was made on the 12th December, 1962, u/s 143 of the Act. Notice u/s 140 of the Act was issued after 1st April, 1964, calling upon the assessee to show cause as to why escaped income should not be assessed u/s 147, In response to that notice, the assessee filed a return on the 23rd August, 1965, but he did not include in that return the two entries of cash credit amounting to Rs. 20,000. The assessment was completed on the 20th December, 1965. Entries relating to Rs. 20,000 which the assessee concealed in the returns were assessed as the income of the assessee. Penalty proceedings were initiated u/s 271(1)(c) on that very day. Thereafter a penalty was imposed of Rs. 12,900 by the IAC u/s 271(1)(c) of the Act read with the Explanation on the 18th November, 1967. The Tribunal in appeal cancelled the penalty and directed refund of the same. Accordingly, the reference came up before the Orissa High Court. The contention was that the Tribunal acted contrary to law in not applying Section 271(1)(c) read with the Explanation which came into force from 1st of April, 1964. By this amendment, the word "deliberately" was omitted from Clause (c) of Section 271(1) and an Explanation was added under which the onus was shifted upon the assessee to prove, in a case, where the total income returned was less than eighty per cent, of that amount, that the failure to return the correct income did not arise from any fraud or any gross or wilful neglect on his part failing which it would be deemed that the assessee had concealed the particulars of his income or furnished inaccurate particulars of such income for the purpose of Clause (c) of this sub-section. Mr. Jain contended that the decision is also distinguishable on the ground that the amendment which was made being procedural law would apply retrospectively. Be that as it may, the decision in this case mainly rests upon the paragraph relied upon by Mr, Rajgarhia in Jain Bros. and Others Vs. The Union of India (UOI) and Others, , which I have already distinguished and held that the said case has no bearing on the facts of the present case and was a decision turning upon the provision of Section 297(2)(g). Therefore, it is difficult for me to follow this decision of the Orissa High Court and I say this with much respect.

17. Reference was also made by Mr. Rajgarhia to an unreported decision of this court in Commissioner of Income Tax Vs. Parmanand Advani, , in which one of us, S. Sarwar AH J., was a member, but this case does not help the revenue as it is distinguishable on its own facts. It was a case where, it was in the processing of the revised return, which was filed after the Expln. to Section 271(1) of the Act was added, that the ITO became satisfied of the concealment. It has further been held that the amendment by which the Expln. to Section 271(1) was introduced only prescribed a rule of evidence relating to the burden of proof and

that this provision is purely procedural in nature and, therefore, irrespective of the date on which the offence was committed this provision will be attracted if the proceeding for punishing the offender was pending on the date when it came into force.

18. For the reasons stated above, I hold that the Income Tax Tribunal was correct in its decision and in imposing a minimum penalty for each of the two assessment years in question by applying the law which was in force at the time of filing the original return. The question referred to this court is accordingly answered in the affirmative and in favour of the assessee. As the assessee has succeeded he is entitled to costs. Hearing fee is assessed at Rs. 200.

S. Sarwar Ali, J.

19. I agree.