(1992) 03 GUJ CK 0030

In the Gujarat High Court

Case No : Income-tax Reference No. 77 of 1978

Commissioner of Income Tax APPELLANT

Vs

B.P. Mehta RESPONDENT

Date of Decision : 27-03-1992

Acts Referred:
Income Tax Act, 1961 — Section 209, 209(3), 209A, 212(3A), 256(2)

Citation : (1992) 107 CTR 39 : (1993) 199 ITR 654

Hon'ble Judges : S.D. Shah, J;S.B. Majmudar, J

Bench : Division Bench

Advocate : R.J. Shelat, for the Appellant; D.A. Mehta, for the Respondent

Judgement

S.D. Shah, J.—On being moved u/s 256(1) of the Income Tax Act, 1961, the Income Tax Appellate Tribunal has referred the following

questions of law for our opinion :

1. Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was Justified in law in holding that the assessee

having filled the estimate of advance tax payable by him u/s 212(3A) of the Act before the due date but failing to make payment of advance tax in

accordance with the said estimate, penalty u/s 273(2)(c) of the Act cannot be levied ?

2. Whether, on the facts and in the circumstance of the case, the Income Tax Appellate Tribunal was right in law in cancelling the penalty imposed

u/s 273(2)(c) of the Income Tax Act, 1961 ?

2. In order to answer the aforesaid questions, it will be necessary to have a glance at a few relevant facts which are stated herein :

(i) The assessee is an individual who derived his income from salary, property as well as share of profit from two firms. He was regularly assessed

from the assessment years 1966-67. He was called upon by the Income Tax Officer to make payment of advance tax u/s 210 of the act amounting

to Rs. 1,080. The assessee paid two equal installments of Rs. 361 on June 15, 1970, and on September 15, 1970. Thereafter, a revised notice of

demand for payment of advance tax of Rs. 47,300 calling him to make payment of the amount on or before December 15, 1970, was issued and

was served on him on December 3, 1970. The assessee submitted on estimate of advance tax u/s 212(3A) declaring a total income of Rs.

1,16,231 on which the tax payable was Rs. 69,120, which was actually paid by the assessee on February 9, 1971.

(ii) The Income Tax Officer found that, while the assessee had filed an estimate of advance tax, he has failed to make payment of the advance tax

on the due date and, therefore, he came to the conclusion that the assessee had committed default u/s 212(3A) of the Act and, secondly, he was

liable to penalty u/s 273(2)(c) of the Act. The Income Tax Officer, thereupon, initiated proceeding for imposition of penalty and, after providing an

opportunity of being heard to the assessee, imposed a penalty of Rs. 5,900.

(iii) Being aggrieved by the said order passed by the Income Tax Officer, the assessee went in appeal to the Appellate Assistant Commissioner

who upheld the order of the Income Tax Officer.

(iv) Being aggrieved by the order pawed by the Appellate Assistant Commissioner, the assessee moved the Income Tax Appellate Tribunal and

the Tribunal, by its judgment and order dated February 9, 1977, allowed the appeal preferred by the assessee and vacated the order passed by

the Income Tax Officer and as confirmed by the Appellate Assistant Commissioner.

The Tribunal found that the assessee did file an estimate of advance tax payable by him u/s 212(3A) of the Act before the due date, but that he has

failed to make payment of advance tax in connection with the said estimate and that, for such default, the provisions of section 273(2)(c) would not

be attracted.

(v) On being moved u/s 256(1) of the said Act, the above mentioned two question are referred to us for our opinion.

3. In order to answer the aforesaid questions, it would be necessary to set out

the provisions of section 212(3A) as it stood at the relevant period :

212. (3A) In the case of any assessee who is required to pay advance tax by an order u/s 210, if, by reason of the current income being likely to

be grater than the income on which the advance tax payable by him u/s 210 has been compute or for any other reason, the amount of advance tax

computed in the manner laid down is section 209 on the current income (which shall be estimated by the assessee) exceed the amount of advance

tax demanded from him u/s 210 by more than 33-1/3rd per cent. of the latter amount, he shall, on or before the date on which the last installment

of advance tax is due from him, send to the Income Tax Officer an estimate of -

(i) the current income, and

(ii) the advance tax payable by him on the current income calculated in the manner laid down in section 209,

and shall pay such amount of advance tax as accords with his estimate on such of the dates applicable in his case u/s 211 as have not expired, by

installments which may be revised according to sub-section (2).

4. From the aforesaid provision, it becomes clear that an assessee who is required to pay advance tax by an order u/s 210, because of increase in

current income which is likely to be grater than the income on which the advance tax payable by him u/s 210 is computed or, for any other reason,

the amount of advance tax compute exceeds the amount of advance tax demanded from him by more than 33-1/3rd per cent., he is required on or

before the date on which the last installment of advance tax is due from him, to send to the Income Tax Officer an estimate of (i) his current income

and (ii) the advance tax payable by him on the current income calculated in the manner laid down in section 209, and he shall pay such amount of

advance tax as accords with his estimate. The liability of the assessee is, therefore, to send to the Income Tax Officer an estimate of hi current

income and the advance tax payable by him and he is also liable to pay such of advance tax as accords with his estimate.

5. In the present case, admittedly, the assessee has sent to the Income Tax Officer an estimate of his current income and the advance tax payable

by him on the current income calculated in the manner laid down in section 209 but he has failed to pay such amount of advance tax as would

accord with his estimate. There is, therefore, failure on the part of the assessee to pay the advance tax as was payable by him as per his estimate

on the due date.

6. It will be necessary at this stage to refer to section 273(2)(c) under which proceedings for penalty are initiated against the assessee. Section

273(2)(c), as it stood at the relevant date, reads as under :

273. (2) If the Assessing Officer, in the course of any proceedings in connection with the regular assessment for the assessment year commencing

on the 1st day of April, 1970, or any subsequent assessment year, is satisfied that any assessee - ....

(c) has failed to furnish an estimate of the advance tax payable by him accordance with the provisions of sub-section (4) of section 209A or sub-

section (3A) of section 212,

he may direct that such person shall, in addition to the amount of tax, if any, payable by him, pay by way of penalty....

7. From the aforesaid provision, it becomes clear that, when the Income Tax Officer, in connection with the regular assessment for the assessment

year commencing on the first day of April, 1970, or any subsequent assessment year is satisfied that any assessee has failed to furnish an estimate

of advance tax payable by him in accordance with the provisions of sub-section (3A) or section 212, he may direct such person to pay penalty.

The language of section 273(2)(c) is very clear. What is stipulated is that, on the failure of an assessee to furnish an estimate of advance tax

payable on the failure of an assessee to furnish an estimate advance tax payable by him in accordance with the provisions of sub-section (3A) or of

section 212, penalty can be imposed. The question that arises for our consideration is as to whether it can be said that, in the facts and

circumstances of this case, the assessee has failed to furnish an estimate of advance tax payable by him in accordance with the provision of section

212(3A). Factually, the assessee has furnished an estimate of advance tax payable by him as required by section 212(3A). So far as furnished of

an estimate of advance tax is concerned, therefore, it cannot be said that the assessee has failed to furnish an estimate of advance tax. The assessee

has undoubtedly failed to pay the advance tax which he was required to pay u/s 212(3A). However, default on the part of assessee in making

payment of advance tax is not made the ground for imposition of penalty u/s

273(2)(c). Penalty can be imposed u/s 273(2)(c) on an assessee

failing to furnish the estimate of advance tax payable by him but not for failure to pay the amount of advance tax u/s 212(3A). From the clear

language employed in section 273(2)(c), it is the default in furnishing an estimate of advance tax payable by an assessee which can be subjected to

imposition of penalty. Failure to make payment of advance tax u/s 212(3A) of the Act would not attract initiation of proceeding for penalty u/s

273(2)(c).

8. Mr. B. J. Shelat, the learned advocated appearing for the Revenue, has strenuously urged that, if section 212(3A) is properly read, it imposes

twin obligation on the assessee, namely, (i) of sending to the Income Tax Officer an estimate of his current income and (ii) an estimate of the

advance tax payable by him on the current income calculated in the manner laid down in section 209(3) and to pay such amount of advance tax as

accords with his estimate. He, therefore, submitted that, u/s 212(3A), it is the liability of the assessee to send an estimate of advance tax payable

by him and also to pay such amount of advance tax as accords with estimate. In his submission, the aforesaid obligations are interconnected and if

only the estimate of advance tax is sent to the Income Tax Officer without paying the advance tax which is payable as per estimate, the liability to

penalty is incurred. In our opinion, the liability for penalty u/s 273(2)(c) is incurred by the assessee only when the assessee fails to furnish an

estimate of advance tax payable by him in accordance with the provisions of section 212(3A). Section 273(2)(c) does not deal with liability which

may arise because of failure of the assessee to pay such amount of advance tax as accords with the estimate of advance tax payable by the

assessee. For such failure, provision is made in section 273 which empowers the Income Tax Officer to impose penalty after following the

procedure prescribed in section 273. However, this section makes no reference to failure on the part of assessee to make payment of advance tax

along with his estimate of advance tax. In view of the fact the Revenue has invoked the provisions of section 273(2)(c) only while imposing penalty,

it is not permissible for us to make reference to any other provisions of the Act for the purpose of upholding the imposition of penalty by the

Revenue.

9. At this stage, it is also required to be mentioned that Mr. B. J. Shelat, the learned advocate for our opinion may be reframed and that this court

should also decide the question as to whether the assessee was otherwise liable to pay the penalty, if any, u/s 273(2)(c) or u/s 221 of the said Act.

In our opinion, it is not permissible for us to reframe the question referred to us in the fact and circumstances of this case because no foundation is

laid for such a case before the Income Tax Officer, the Appellate Assistant Commissioner as well as before the Tribunal. It is required to be noted

that, despite the say of counsel for the assessee before the Tribunal that the liability may arise u/s 221 of the Act, no attempt was made by the

Revenue before the Tribunal to permit the Revenue to take action u/s 221 of the said Act. Since, in reference jurisdiction, our jurisdiction is

advisory and since reframing of question is not permissible for us in the facts and circumstances of this case, we are of the opinion that the request

of Mr. B. J. Shelat cannot be entertained. In our advisory jurisdiction, we are required to give our opinion and which arise out of the judgment of

the Income Tax Appellate Tribunal. However, in the facts and circumstances of this case, we may observe that the Revenue will be at liberty to

take appropriate proceedings against the assessee in accordance with law.

10. We answer the reference accordingly by answering the questions referred to us in the affirmative, i.e., in favour of the assessee and the against

Revenue. No costs.