
(2003) 02 CAL CK 0020

In the Calcutta High Court

Case No : Income-tax Reference No. 20 of 1998

Commissioner of Income Tax

APPELLANT

Vs

Capital Electronics (Gariahat)

RESPONDENT

Date of Decision : 11-02-2003

Acts Referred:

Income Tax Act, 1961 — Section 271B, 273B, 44AB

Citation : (2003) 181 CTR 402 : (2003) 261 ITR 4 : (2003) 129 TAXMAN 731

Hon'ble Judges : R.N. Sinha, J;D.K. Seth, J

Bench : Division Bench

Advocate : Dipak Deb, for the Appellant; Mihir Lal Bhattacharjee, for the Respondent

Judgement

D.K. Seth, J.—The question referred to this court for answer is as follows :

"Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is justified in cancelling the penalty imposed u/s 271B of the Act on the ground that there was no absolute default on the part of the assessee to get the accounts audited ?"

2. Mr. Mihir Lal Bhattacharjee, learned senior counsel for the assessee, had pointed out that though the learned Tribunal had rejected the assessee's explanation with regard to the reasonable cause for default contemplated u/s 271B in respect of furnishing the audited accounts required u/s 44AB, it is a quasi-criminal matter as was held in the case of Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, , therefore, according to him, the default does not automatically attract the mischief of penalty in view of the changed proposition of law now prevailing and accepted by the Supreme Court and various other High Courts. He relied on the decisions in Commissioner of Income Tax Vs. Ask Enterprises, ; The Commissioner of Income Tax, West Bengal 1, Calcutta Vs. Vegetables Products Ltd., ; Calcom Electronics Ltd. v. Sales Tax Officer [2001] 121 STC 600 ; M/s Mysore Minerals Limited, M.G. Road, Bangalore Vs. The Commissioners of Income Tax, Karnataka, Bangalore, ; Rupa Ashok

Hurra Vs. Ashok Hurra and Another, ; Commissioner of Income Tax Vs. Jai Durga Construction Co., and Cemento Corporation Ltd. Vs. Collector Central Excise, . Relying on these decisions, he contended that the expression "may" employed in Section 271B is not mandatory but discretionary. It is not an absolute proposition that rejection of reasonable cause would definitely result in the imposition of penalty. According to him, by reason of Section 273B, the Legislature had intended that the imposition of penalty would not be an absolute proposition.

3. Mr. Dipak Deb, learned counsel appearing on behalf of the Department, on the other hand, contends that the statute has to be interpreted in the manner it has expressed its intention. Neither the Tribunal nor the court can interpret an enactment in a manner different from the way it is expressed by the Legislature through express language "employed" therein. According to him, once the explanation is rejected, in a reference, there is no scope for interfering with the same and then there is no discretion left with the authority but to impose penalty. The absence of absolute default is something, which cannot be reconciled with the provisions of the statute. In order to show that once there is a default, the imposition of penalty is inevitable, he relied on the decisions in Commissioner of Income Tax (Additional), Lucknow Vs. Jeevan Lal Sah, ; Commissioner of Income Tax Vs. Mussadilal Ram Bharose, ; Commissioner of Income Tax, Madras Vs. K.R. Sadayappan, ; B.A. Balasubramaniam and Bros. Co. Vs. Commissioner of Income Tax, ; Maya Rani Punj Vs. Commissioner of Income Tax, Delhi, ; COMMISSIONER OF Income Tax Vs. KIL KOTAGIRI TEA AND COFFEE ESTATES LTD., and Commissioner of Income Tax Vs. Ramkrishna Stores, and on a passage from the Income Tax Law by Chaturvedi and Pithisaria, fifth edition, page 8663.

4. In reply, Mr. Bhattacharjee had relied on an unreported decision in Pawan Kumar Agarwal v. CIT-W. P. T. T. No. 19 of 2000 disposed of by a Division Bench presided over by the hon"ble Mr. Justice Tarun Chatterjee as his Lordship then was and the hon"ble Mr. Justice S. P. Talukdar of this court on July 24, 2002, and contended that the law has undergone a change with regard to the imposition of penalty. Unless it is shown that there is deliberate and wilful violation and that the Revenue has suffered in consequence of such violation, no penalty can be imposed. It is not an absolute proposition for imposing penalty.

5. The propositions of law enunciated by the respective counsel are already well-settled. But such proposition is applicable in given facts. Section 44AB requires an assessee to get his accounts audited within the stipulated time, which, in this case, expired on June 30, 1987. The assessee had submitted the audited accounts on December 4, 1989, long after the expiry of the period, but admittedly before the assessment was complete. Section 271B inserted with effect from April 1, 1985, began with the phrase. "If any person fails without reasonable cause, to get his accounts audited" within the time stipulated, then the concerned Income Tax authority "may direct that such person shall pay by way of penalty", the sum mentioned therein. By the Taxation Laws (Amendment

and Miscellaneous Provisions) Act, 1986, the phrase "without reasonable cause" was omitted with effect from September 10, 1986. By the said 1986 Act, Section 273B was introduced in the Act. This section provides that no penalty shall be imposed u/s 271B if the assessee is able to prove that there was reasonable cause for the said failure.

6. Section 271B, inserted through the 1984 Finance Act, appears to be a little different when amended through the Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986. The Legislature had an intention for the omission of the phrase "without reasonable cause" qualifying the failure to get the accounts audited. The substantive provision providing for penalty omitted to qualify the failure inviting the penalty. Thus, the substantive law creating liability, attracting penalty was made unqualified. Whereas through the 1986 amendment Act, Section 273B was inserted. A plain reading of the text of Section 273B makes it clear that the same is a procedural law with regard to the question of imposition of penalty under different sections including Section 271B. Section 271B mandates imposition of penalty on the failure, but, by reason of the rule of evidence provided in Section 273B, such imposition of penalty is dependent on the proof that there was no reasonable cause for the failure. The omission of the particular phrase from the substantive law and incorporation thereof in the procedural law bears the legislative intent to make the provision of Section 271B coercive instead of penal. This amendment was intended to remove the scope of any confusion with regard to the characteristics and nature of the proceedings u/s 271B, as we shall discuss a little later. The word "may" employed in Section 271B, though may be interpreted as discretionary yet that discretion is limited within the confines of Section 271B providing the procedure therefore. The word "may" has been used only to accommodate the procedural law enabling the assessee to prove that there was reasonable cause for the failure. Unless it is proved that there was reasonable cause for the failure, there is no escape from the imposition of penalty. Section 271B does not leave any discretion at the hands of the authority except as provided in Section 273B. It is only when reasonable cause for failure is proved, the penalty can be avoided. A combined reading of the two sections does not admit of any theory of absolute default in order to attract the mischief of Section 271B.

7. Now, in the above context, let us examine the present case. At page 48 of the paper book, the learned Tribunal had rejected the explanation sought to be set up to prove reasonable cause. Immediately thereafter, it had observed that the learned Tribunal was of the view that there was no absolute default on the part of the assessee to get the accounts audited. Therefore, at the time when the penalty was being intended to be imposed, there was no existing failure. This proposition seems to be doubtful. If there was a default, then the penalty can be imposed. It is not necessary that the default is to continue till imposition of penalty. The reading of Section 271B does not imply that the default must be a continuous one and that if the audit is made before the completion of the assessment then the penalty is not imposable. Such a construction cannot be

made having regard to the language employed in Section 271B read with Section 273B.

8. In *Maya Rani Punj Vs. Commissioner of Income Tax, Delhi*, , dealing with Section 271(1)(a), it was held that the wrong for which the penalty was to be visited, commenced from the date of default and continued month after month until compliance and the default came to an end. The rule of *de die in diem* was applicable not on daily but on monthly basis. That imposition of penalty is not confined to the first default but with reference to the continued default was obviously on the footing that non-compliance with the obligation of making a return was an infraction as long as the default continued. If a duty continued from day-to-day, the non-performance of that duty from day-to-day is a continuing wrong. The legislative scheme u/s 271(1)(a) of the 1961 Act in making provision for a penalty conterminous with a default provided for a situation of continuing wrong. This principle fits in with the construction of Section 271B read with Section 273B. It is only when reasonable cause is shown, there is no scope for imposing the penalty, as was held in *Commissioner of Income Tax Vs. Ramkrishna Stores*, . In *Income Tax Law* by Chaturvedi and Pithisaria, fifth edition, page 8663, the situation was dealt with where it was observed that the onus of proving the existence of reasonable cause for default is cast on the assessee and *mens rea* is irrelevant once the default is committed on or after September 10, 1986.

9. But, at the same time, we cannot be oblivious of the changes in the law and its evolution as being evolved by the different High Courts and the apex court from time to time. While interpreting a particular provision of the statute, we cannot close our eyes and confine our endeavour only within the four corners of the statute itself. When the question of penalty is in the nature of quasi-criminal in character then the principle relating to criminal jurisprudence are required to be looked into. It is not always that an interpretation is to be made without extraneous aid only having regard to the statute itself seeking internal aid therefrom. Sometimes we may seek external aid having regard to the settled proposition of law.

10. We, therefore, are required to examine the decisions cited by Mr. Bhattacharjee and Mr. Deb and also the order passed by the learned Tribunal having regard to the context and in the facts and circumstances of the case in which such penalty is required to be imposed.

11. In *Commissioner of Income Tax Vs. Ask Enterprises*, , it was held that where there was a finding that there had been an inadvertent mistake in respect of a particular default, the decision of the learned Tribunal to cancel the penalty was justified. This principle was enunciated on the question that the penalty is an exercise of quasi-criminal jurisdiction. In *Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali*, , it was held that the imposition of penalty being a quasi-criminal proceeding can be imposed only when there is some deliberate attempt in the flouting of the provision. Mr. Deb, however, contended

that this decision in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, is no more a good law and the questions of mens rea is not necessary for the purpose of imposing penalty. However, Mr. Bhattacharjee did not want to cite this case on the question of mens rea. He had cited this decision only to impress upon us that the proceeding for imposition of penalty is quasi-criminal in nature. The principle of conscious omission or deliberate misinformation propounded in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, had undergone change as we find from the decision in Commissioner of Income Tax (Additional), Lucknow Vs. Jeevan Lal Sah, .

12. That a proceeding to impose penalty is quasi-criminal in character is not always correct. The concept, that all penalties in civil matters assume the character of quasi-criminal one, has of late undergone a change. In fact, the question is dependent on the characteristic of the proceedings. A distinction has to be drawn between the two kinds of proceedings in order to ascertain whether the proceeding is a quasi-criminal one or simply a coercive method to secure compliance of a particular provision. A penalty provided, if appears to be a provision for securing compliance by introducing coercive process it is something implicating a penal interest. If instead of penalty interest was payable, in that event, it would not assume the characteristic of quasi-criminal proceedings. Therefore, the nature of the proceeding has to be examined having regard to the context under which the liability is created. If the liability reveals a civil liability only to ensure compliance through a coercive manner, then it is definitely a civil liability without any criminal implication. But as soon as a criminal liability is imposed by reason of default in compliance of a particular provision and there is some element of criminality involved in the default, the proceeding can be said to be a quasi-criminal one. The presence of the element of criminality is one of the factors that determines the question.

13. Section 44AB imposes a liability to get the accounts audited within the stipulated time. There is nothing in the section to make it incumbent to furnish the audited accounts within the stipulated time. Failure to furnish, therefore, will not attract the mischief of Section 271B, though failure to get the accounts audited within the stipulated time would attract it. Initially the liability imposed u/s 271B was qualified with the phrase "without reasonable cause". This indicated somewhat a substantive proposition of law, which could have been treated to be an indication of inviting an element of quasi-criminality in the failure. But as soon it is omitted, it simply becomes a coercive manner or method to ensure compliance of Section 44AB. No element of quasi-criminality seems to be present in Section 271B. While laying down the procedure in Section 273B, the reasonable cause has been made a factor preventing the Income Tax authority from imposing penalty. This being a procedural law, the liability would not indicate any quasi criminal implication in the default; but it only lays down a procedure making it a rule of evidence as to when penalty could be imposed. Thus, it seems, though described as penalty, it is really creating a civil liability in default of compliance of Section 44AB.

14. This proposition is a little different from the proposition provided in Section 271(1)(c) under consideration Commissioner of Income Tax, Madras Vs. K.R. Sadayappan, . At the relevant point of time Section 271(1)(c) contained an exception which made the liability imposable only when the failure could be attributed to any fraudulent act or omission, or gross or wilful negligence of the asses-see. The decisions in Commissioner of Income Tax Vs. Mussadilal Ram Bharose, ; B.A. Balasubramaniam and Bros. Co. Vs. Commissioner of Income Tax, following Commissioner of Income Tax Vs. Mussadilal Ram Bharose, and Commissioner of Income Tax (Additional), Lucknow Vs. Jeevan Lal Sah, were also concerned with the same proposition where the liability arose out of wilful or gross neglect or from fraudulent act or omission on the part of the assessee, which bears an element of criminality or a quasi-criminal implication. Similarly, the decision in Commissioner of Income Tax Vs. Ask Enterprises, , proceeded on the footing that the penalty was a result of deliberate action, which made the proceedings quasi-criminal. Mr. Deb's reliance on COMMISSIONER OF Income Tax Vs. KIL KOTAGIRI TEA AND COFFEE ESTATES LTD., , however, in our view, has no manner of application in the present facts and circumstances of the case.

15. At the same time, we cannot be oblivious of the fact that a penalty imposable, as law declared by the apex court today, is different from a penalty imposable for an act or omission involving an element of criminality. The default involves civil consequences in the form of penalty. Section 271B is inserted for effective compliance. The text of Section 271B does not admit of any concept of element of criminality in the default.

16. Ordinarily, the court is concerned with the interpretation, but the changing concept adapting itself with the development in the society, as recognised by the apex court in Rupa Ashok Hurra Vs. Ashok Hurra and Another, , makes us aware of the role of the judiciary. It is no more confined merely to interpret or declare law, a concept of bygone age. In order to adapt and adjust the requirements of law with the changing conditions of the society, the court is now required to mould and lay down the law formulating the principles and guidelines for fulfilling the ultimate object of dispensing justice. Therefore, having regard to the said principle, in our view, it is no more open to declare every penalty a quasi-criminal one. The court has to find out whether there is any element of criminality or it is simply a process introducing coercive manner or method for securing compliance. If it is of a latter kind, then it results in a simple civil liability without any element of criminality, then there cannot be any scope of importing the question of mens rea or deliberate or wilful act or omission or gross negligence in order to accommodate the concept of absolute default.

17. In Gujarat Travancore Agency, Cochin Vs. Commissioner of Income Tax, Kerala, Ernakulam, , the apex court had held that a penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature and is far different from a penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws. Quoting from Corpus juris Secundum,

volume 85, at page 580, in paragraph 1023, the apex court had held that the element of mens rea was not required to be proved in the proceeding taken by the Income Tax Officer u/s 271(1)(a) of the Act against the assessee for the assessment years 1965-66 and 1966-67.

18. The question of mens rea as was initiated in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, having been no longer a good law and the same having been changed, the contention of Mr. Bhattacharjee that the procedure being a quasi-criminal in nature, there must be some element of deliberate omission is immaterial. By reason of the change in law as was then applicable, it is only the reasonable cause for the default that could be gone into and nothing more, nothing less. Therefore, if there is a default, whether there was mens rea or not is immaterial; the liability in the form of penalty can be imposed simply on the default if it is not explained by proving reasonable cause for the default. In Rupa Ashok Hurra Vs. Ashok Hurra and Another, , the apex court had held that the question of imposition of penalty is not an automatic proposition. In order to impose such penalty, the court has to take into account various other materials and has to look into the surroundings so as to enable the authority to impose the penalty. In Calcom Electronics Ltd. v. Sales Tax Officer [2001] 121 STC 600 followed in Pawan Kumar Agarwal's case--W. P. T. T. No. 19 of 2000 disposed of on November 15, 2002, a Division Bench of this court had also followed the same principle, which, in our view, is distinguishable in view of the liability created u/s 68 of the West Bengal Sales Tax Act having an element of quasi criminal implication.

19. But then each case has to be examined on the facts and circumstances and the materials on record as presented before the court. If two interpretations of a particular provision are possible, then the one favourable to the assessee is to be accepted. In Cemento Corporation Ltd. Vs. Collector Central Excise, , , the apex court had held that "... when two constructions can be equally drawn, the one favourable to the taxpayer should be adopted . .." The same principle was enunciated in M/s Mysore Minerals Limited, M.G. Road, Bangalore Vs. The Commissioners of Income Tax, Karnataka, Bangalore, . In The Commissioner of Income Tax, West Bengal 1, Calcutta Vs. Vegetables Products Ltd., , the apex court had held that where the language of a taxing provision is ambiguous or capable of more meanings than one, then the court has to adopt that interpretation which favours the assessee, more particularly so where the provision relates to the imposition of penalty. However, these decisions do not help us with regard to the question of law in the absence of any ambiguity in the statutory provision under consideration, though this principle might be of help if there is any ambiguity in the findings of fact.

20. There is no doubt about the proposition. We are conscious about the situation. Having regard to this proposition as discussed above, we are of the view that there is no scope for finding out mens rea or compliance or substantial compliance to absolve the liability of the assessee from the penalty. There cannot

be any proposition conceived of to the extent that if there was a substantial compliance or if there was no absolute default then the penalty cannot be imposed. But the statute had used the expression "may" employed in Section 271B, which, in our view, cannot be treated to be mandatory. It has left a discretion with the taxing authority in given facts and circumstances that the penalty may not be imposed if they are satisfied that there was sufficient ground for not imposing the penalty. But it depends on the facts of each case and having regard to the materials placed before it or where the finding is such that it can conceive of two alternate meanings, then the meaning beneficial to the assessee is to be accepted.

21. In the present case, after having rejected the explanation explaining the reasonable cause as sufficient, it was incumbent on the taxing authority to impose penalty. There was no escape from the same. But at the same time, a particular portion cannot be read out of context. The order has to be read as a whole. Though not happily coined, the observation that there was no absolute default, in effect, if read together, would go to show that the learned Tribunal was of the view that there was some reasonable cause for default. We cannot read the latter part of the order at paragraph 5 bereft of the first part or vice versa. If both the parts of the order are reconciled, then it would appear that even after having rejected the ground mentioned, yet the taxing authority had found that it is a case where such discretion could have been exercised. The rejection was made on the technical ground that certain documents were not available before the Assessing Officer and was sought to be produced only before the learned Tribunal. On the technical ground, the learned Tribunal could not accept the said evidence and the explanation given and had rejected the same, but ultimately it had found that there was something in favour of the assessee. In the facts and circumstances of the present case, having gone through the order with regard to the concluding finding of the facts, we are of the view that it is capable of two meanings--one in favour of the assessee and the other against him. So far as the meaning which is in favour of the assessee that the learned Tribunal, though rejected the grounds, but did not come to a definite conclusion and that there was no reasonable cause for default, and on the other hand, by reason of observing that there was no absolute default, it had come to a conclusion that there is some reasonable cause behind committing the default. Since two meanings could be apprehended from the order of the learned Tribunal, we would prefer to accept the one beneficial to the assessee.

22. After having gone through the order, it seems to us that there was no absolute rejection of the reasonable cause by the learned Tribunal if we reconcile the different parts of the order together and then that, which is in favour of the assessee may be accepted. We, therefore, answer the question in the negative, in favour of the Revenue with regard to the theory of absolute default, but having regard to the facts and circumstances of the present case on the ground that the learned Tribunal did not come to a definite finding that there was no reasonable cause as is apparent from its observation on the facts peculiar to this

case, we decline to interfere with the order of the learned Tribunal cancelling the penalty.

R.N. Sinha, J.

23. I agree.