
(1994) 01 CAL CK 0033

In the Calcutta High Court

Case No : Income-tax Reference No. 210 of 1991

Commissioner of Income Tax

APPELLANT

Vs

Deepak Trading Co.

RESPONDENT

Date of Decision : 05-01-1994

Acts Referred:

Income Tax Act, 1961 — Section 271, 271(1), 271(2)

Citation : (1994) 120 CTR 450 : (1994) 208 ITR 304 : (1994) 77 TAXMAN 287

Hon'ble Judges : Nure Alam Chowdhury, J;Ajit Kumar Sengupta, J

Bench : Division Bench

Advocate : R.C. Prasad and A.C. Moitra, for the Appellant; Manas Banerjee and J.P. Khaitan, amicus curiae, for the Respondent

Judgement

Ajit K. Sengupta, J.—In this reference made at the instance of the Revenue, the following question has been referred by the Tribunal for the opinion of this court u/s 256(2) of the Income Tax Act, 1961 :

"Whether, in the light of the mandatory provision of law contained in Section 271(2) that for the purpose of levy of penalty u/s 271(1)(a) on a registered firm, the tax payable by it, if it were an unregistered firm, has to be taken into account, the Tribunal in the instant case was right in law in directing the Income Tax Officer to consider only the tax payable by the assessee as a registered firm and to treat the order of penalty u/s 271(1)(a) cancelled, if the firm had not been called upon to pay any further tax on regular assessment over and above the advance tax paid by it as a registered firm ?"

2. The assessee is a partnership firm. This reference relates to the assessment years 1979-80, 1980-81 and 1981-82. For each of these three years, the assessee-firm filed its returns of total income beyond the statutory period prescribed in law. For such delay in filing the tax returns, the Assessing Officer levied penalties of Rs. 4,735, Rs. 3,857 and Rs. 329 for the said three years, respectively. The levy of such penalties was upheld by the Appellate Assistant Commissioner. In the course of second appeal before the Tribunal, it was

contended on behalf of the assessee that the entire tax as assessed upon the assessee, a registered firm, in respect of each of the said three years was duly paid by way of advance tax. In fact, there was excess payment by way of advance tax in each of the said three years and on regular assessment, the assessee became entitled to receive refunds of advance tax paid earlier. The Tribunal, following the decision of the Supreme Court in *Ganesh Dass Sreeram Vs. Income Tax Officer, "A" Ward, Shillong and Others*, , held that no penalty was leviable for late filing of the returns u/s 271(1)(a) of the said Act if it was found that in each of the said three years, the assessee had paid by way of advance tax amounts equal to and/or in excess of what was actually found to be payable on regular assessment.

3. This reference arises out of the aforesaid order of the Tribunal. The case of the Revenue is that the said decision of the Supreme Court is not applicable to a case of penalty leviable u/s 271(1)(a). The Revenue has referred to the decision of this court in *Commissioner of Income Tax Vs. Priya Gopal Bishoyee*, . On behalf of the assessee, reliance has been placed on the decision of the Supreme Court in *Ganesh Dass Sreeram Vs. Income Tax Officer, "A" Ward, Shillong and Others*, as well as on the decision of the Andhra Pradesh High Court in *P. Venkata Krishnayya Naidu and Sons Vs. Commissioner of Income Tax, Andhra Pradesh, Hyderabad*, , the decision of the Rajasthan High Court in *Commissioner of Income Tax Vs. Builders Engineers Co.*, as well as of the Punjab and Haryana High Court in *Commissioner of Income Tax Vs. Harish Chand and Co.*, and in *Commissioner of Income Tax Vs. Braham Prakash and Co.*, .

4. The only question involved in this case is whether any penalty can be levied upon a registered firm u/s 271(1)(a)(i)(b) for failure to file the return within the time prescribed by Sub-section (1) of Section 139 of the Income Tax Act, 1961, even when it was found on completing the regular assessment that the amount of advance tax paid by the assessee-firm is equal to or in excess of the amount of tax found payable on such regular assessment.

5. At the outset, we may set out the relevant portion of Section 271(1)(a)(i)(b) as under :

"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 without reasonable cause 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 without reasonable cause 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 ...

he may direct that such person shall pay by way of penalty,--(i) in the cases referred in Clause (a),--....

(b) in any other case, 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.

Explanation.--In this case, "assessed tax" means tax as reduced by the sum, if any, deducted at source under Chapter XVII-B or paid in advance under Chapter XVII-C."

6. A plain reading of the aforesaid section makes it quite clear that the penalty for delayed filing of return, which can be levied under the aforesaid provision is a sum equal to two per cent. of the assessed tax for every month during which the default continued. The expression "assessed tax", according to the Explanation, means "tax as reduced by the sum, if any, deducted at source under Chapter XVII-B or paid in advance under Chapter XVII-C". In other words, if it is found that the tax deducted at source or paid by way of advance tax exceeds the tax determined on regular assessment, no tax remains due. In other words, the assessed tax becomes zero within the meaning of this Explanation. Since the penalty has to be calculated at a sum equal to two per cent. of the assessed tax for every month during which the default continued, the result is that no penalty can at all be levied even when the provision of this section is held to be attracted to a given case like the present one. The amount of penalty would be zero, according to the mode of calculation, as prescribed in the aforesaid section. In effect, therefore, no penalty can be levied.

7. The Supreme Court in *Ganesh Dass Sreeram Vs. Income Tax Officer, "A" Ward, Shillong and Others*, has dealt with the liability of the assessee, a registered firm, to pay interest in accordance with Sub-section (8) of Section 139 on its failure to file returns within the time allowed under Sub-section (1) of Section 139. At page 230 of the Reports, their Lordships of the Supreme Court made it quite clear that where the advance tax duly paid by a registered firm 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 prescribed by law.

8. In our view, the same principle is applicable even to the question of imposition of penalty for the identical default, viz., filing a return beyond the time prescribed in Sub-section (1) of Section 139. We find that the Andhra Pradesh High Court in *P. Venkata Krishnayya Naidu and Sons Vs. Commissioner of Income Tax, Andhra Pradesh, Hyderabad*, also took the same view and held that where a registered firm fails to furnish its return in time, but paid advance tax which was admittedly larger than the amount payable on its total income, the Income Tax Officer was not empowered to levy penalty u/s 271(1)(a)(i)(b) of the said Act. The SLP filed by the Revenue against the said judgment was rejected by the Supreme Court as reported in *Commissioner of Income Tax Vs. Federal Bank Ltd.*, . The Rajasthan High Court in *Commissioner of Income Tax Vs. Builders Engineers Co.*, also held that where the entire amount of tax had already been paid by a registered firm either by way of deduction of tax at source or by way of

advance tax, the question of imposing penalty could not arise because no tax was actually due. The Rajasthan High Court in this case applied the principles laid down by the Supreme Court in *Ganesh Dass Sreeram Vs. Income Tax Officer, "A" Ward, Shillong and Others*, . Later, the Punjab and Haryana High Court in *Commissioner of Income Tax Vs. Harish Chand and Co.*, and in *Commissioner of Income Tax Vs. Braham Prakash and Co.*, , following the principles laid down by the Supreme Court in *Ganesh Dass Sreeram Vs. Income Tax Officer, "A" Ward, Shillong and Others*, as well as by the Rajasthan High Court in *Commissioner of Income Tax Vs. Builders Engineers Co.*, , case also took the same view that no penalty is leviable u/s 271(1)(a) of the Income Tax Act for delay in filing the return where the tax deducted at source or paid in advance is equal to or exceeds the assessed tax in the case of a registered firm.

9. Reference was made on behalf of the Revenue to the decision of the Full Bench of the Patna High Court in *Jamunadas Mannalal Vs. Commissioner of Income Tax*, which has taken a view that the mandate of Section 271(2) is operative irrespective of the fact that the assessee did not have any assessed tax to pay after adjustment of advance tax paid and the tax deduction at source. We, however, fail to persuade ourselves to agree with the view of the Full Bench of the Patna High Court. The decision of the Andhra Pradesh High Court is based on the correct interpretation because the other view as canvassed by the Department results in a certain absurdity and unjust result. In this connection it may be mentioned that the Central Board of Direct Taxes in a circular instructed the Assessing Officer that Section 271(1)(a) should not be invoked in the case of a registered firm unless its income as a registered firm exceeds the maximum amount not chargeable to tax by Rs. 1,500. At that point of time when the circular was issued the non-taxable limit for a registered firm was Rs. 25,000. Thus the instruction in the circular in effect acknowledges that Section 271(2) cannot be invoked unless the income of the registered firm exceeded Rs. 26,500. It by implication interprets that the effect of the fiction u/s 271(2) is confined only to a case of a firm which has some assessable real tax payable by it and otherwise not. The circular was based on Sub-section (3) of Section 271. Clause (a) of Sub-section (3) says that in no case penalty shall be imposed on an assessee for late filing of the return unless its total income exceeds the non-taxable limit by Rs. 1,500. The Board has indisputably understood that the effect of the fiction in Sub-section (2) cannot flow over to other sub-sections. Sub-section (2) is applicable only if other sub-sections of Section 271 within independent ambit creates a liability to penalty and otherwise not. Therefore, unless the registered firm has assessed tax as a registered firm it does not incur any liability to penalty and if there is no liability to penalty, the question of applying the fiction in Sub-section (2) cannot arise. That sub-section steps in only at a later stage when the registered firm has actual tax payable and the tax assessed again is not infinitesimally small.-

10. That apart, there is also the question of equity that comes in the way of the Departmental contention. In the light of the circular of the Board, the

Departmental interpretation that the fiction in Sub-section (2) extends even to the definition of assessed tax at all stages lands us in an absurd situation. A registered firm though having assessed tax to pay shall yet be exempt from the penal liabilities if the liability is only marginal in the sense that its total income does not exceed Rs. 26,500. But a registered firm that has over-paid advance taxes and is entitled to refund should be inflicted with penalty because its total income exceeded Rs. 26,500. Nothing can be more unjust or inequitable than this particular situation. Therefore, it is only rational to construe that the fiction in Section 271(2) cannot be activated unless an assessee has assessed tax in terms of the Explanation to Section 271(1)(a)(i). That the assessed tax must be a real tax and not a fictional tax has also been the view of the Board when it issued the circular to let off a registered firms marginally taxable, otherwise the Board would not have asked the officer not to invoke Sub-section (2) unless the exempt income of the registered firm is exceeded by Rs. 1,500 by the assessed total income. It is true to say that equitable considerations have no place in the interpretation of the tax laws but this is not an absolute rule and cannot be pushed to the extreme of saying that the interpretation can be unreasonable and unjust even when a more rational interpretation is contrastingly equitable and just. The Supreme Court in *R.B. Jodha Mal Kuthiala Vs. The Commissioner of Income Tax, Punjab, Jammu and Kashmir, Himachal Pradesh and Patiala*, has observed at page 575 that it is true that equitable considerations are irrelevant in the interpretation of tax laws. There is no intendment to be considered but interpretation has, however, to be reasonable and just. No law can ever let itself be used as an instrument of oppression or discrimination. We refer in this connection to a decision of the Madras High Court in *T.R. Rajakumari and Others Vs. Income Tax Officer, Central Circle VI, Madras*, . It has held that there is no equity or intendment in tax law yet the same principle does not or cannot extend to a penal proceedings.

11. There is one more angle to the whole issue vindicating the view taken by the Andhra Pradesh High Court and some other High Courts. At one point of time it had been a controversy whether the same assessee can be punished with both interest and penalty for late filing or non-filing of the return. The courts have held that the two levies are on different considerations. Interest is merely compensatory. It makes good the loss suffered by the public exchequer for the withholding of the payment of tax by the assessee through delaying or non-filing return but the object of levying penalty is deterrent. The concept of deterrence is a matter to be given thought. A man is punished as a deterrent by showing to him and other potential offenders that the injury which he causes to others brings injury to him. In this connection, Salmond's observation may be quoted :

"Punishment prevents offences by making all deeds which are injurious to others injurious to the offender by making every offence an ill bargain to the offender."

12. If we accept that the purpose of penalty is deterrent in that case no deterrent is called for where the firm has overpaid its tax. Here the assessee has

caused no injury to anybody, neither to the society nor the public exchequer. If it has done injury, that injury is to itself. It is a self-inflicted injury by not getting its refund earlier than it did or by letting the Department use its money longer than due. In any case, the principle is entrenched firmly that the penalty proceeding is to commence where the taxpayer including a registered firm is either liable to penalty for late returns and for that purpose it is not enough that the omission or commission referred to in Section 271(1)(a) has happened. The Revenue has to be further satisfied, not inhibited by any fiction or artificial consideration, whether the assessee has actually assessed tax. If no assessed tax is there due for payment on assessment after adjustment of advance tax and tax deduction, the assessee, whether it is a registered firm or not, has to be exonerated. But if it is found liable to pay tax upon assessment and thereby liable to penalty, it is at that stage only that the fictional computation of tax shall be called for and penalty shall be based on such fictional tax.

13. The earlier decision of this court in *Commissioner of Income Tax Vs. Priya Gopal Bishoyee*, is clearly distinguishable. In that case, the assessee, a registered firm, had filed its return of total income for the assessment year 1963-64 late by over 15 months. On regular assessment, a tax demand of Rs. 5,657.44 was determined to be payable by the assessee-firm in that case. This sum of Rs. 5,657.44 had been paid by the assessee-firm after the completion of regular assessment on September 20, 1967, while the order for the imposition of penalty was passed subsequent thereto on June 29, 1969. The contention of the assessee before this court was that since on the date of imposition of penalty, no assessed tax was remaining due and/or payable by the assessee, a registered firm, no penalty could be levied for delayed filing of the return. The Income Tax Officer, however, had levied a penalty of Rs. 15,335 being two per cent. of the tax for every month during which the default continued. This penalty had been calculated on the basis of tax due from an unregistered firm as envisaged by Section 271(2) of the said Act. This court held that the expression "for every month during which the default had continued" would not govern the period for which the tax had remained unpaid. But in determining the period during which the default had continued, the period as contemplated by Section 271(1)(a) would be applicable. The default in that case was the delay in the submission of the return. Therefore, this court held that the fact that the payment of assessed tax is subsequently made by the registered firm would not exonerate it from imposition of penalty when such penalty was to be calculated on the basis that it was an unregistered firm.

14. The facts of the said case are clearly distinguishable. That was not a case where advance tax already paid by the assessee, a registered firm, was found to be in excess of the tax determined on regular assessment. That was a case where the assessed tax within the meaning of the Explanation to Section 271(1)(a)(i)(b) was found to be a positive figure after taking into account tax deducted at source and/or paid by way of advance tax.

15. Once the assessed tax is found to be a positive figure and the assessee-firm is found to have delayed the filing of its return, the penalty becomes automatically leviable. In such a case, the penalty has to be levied by recalculating the tax as if it was an unregistered firm for the purpose of imposition of penalty as provided in Sub-section (2) of Section 271 of the said Act.

16. However, the facts of the present case are clearly distinguishable from those of Commissioner of Income Tax Vs. Priya Gopal Bishoyee, . Here, the assessee had admittedly paid by way of advance tax much more than what was determined on the basis of the total income assessed on regular assessment. Therefore, the assessed tax within the meaning of the Explanation to Section 271(1)(a)(i)(b) is clearly a negative figure. In this situation, no penalty can at all be calculated. This is not a case where the tax determined on regular assessment is subsequently paid by the assessee, a registered firm, long after the completion of the regular assessment, as was the situation prevailing in Bishoyee's case.

17. For the foregoing reasons, we answer the question in the affirmative and in favour of the assessee.

18. There will be no order as to costs.

Nure Alam Chowdhury, J.

19. I agree.