
(1992) 05 CAL CK 0011

In the Calcutta High Court

Case No : Income-tax Reference No. 108 of 1990

Commissioner of Income Tax

APPELLANT

Vs

Off Shore India Ltd.

RESPONDENT

Date of Decision : 12-05-1992

Acts Referred:

Income Tax Act, 1961 — Section 209A(1), 256(2), 273(2)

Citation : (1994) 122 CTR 290 : (1994) 209 ITR 473

Hon'ble Judges : Shyamal Kumar Sen, J;Ajit K. Sengupta, J

Bench : Division Bench

Judgement

Shyamal Kumar Sen, J.—On an application u/s 256(1) of the Income Tax Act, 1961, the following questions have been referred to this court for determination :

"(1) Whether, on the facts and in the circumstances of the case, the finding of the Tribunal that the assessee had bona fide reasons to believe that it had no taxable income and as such it was not liable to file an estimate of advance tax u/s 209A(1)(b) of the Income Tax Act, 1961, is based on any relevant material or perverse ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in cancelling the penalty imposed u/s 273(2)(b) of the Income Tax Act, 1961 ?"

2. The facts, inter alia, as appear from the statement of case are that the assessee filed its return of income for the assessment year 1979-80 disclosing nil income after adjustment of business loss of the year and after taking into account the deduction admissible u/s 80M of the Income Tax Act, 1961. The assessment was completed on a total income of Rs. 2,47,571 which, in appeal, was reduced to Rs. 2,34,850. Finding that the assessee had defaulted in furnishing an estimate of advance tax payable by it as required u/s 209A(1)(b), the Income Tax Officer initiated penalty proceedings u/s 273(2)(b). The assessee submitted its explanation which was rejected by the Income Tax Officer who

levied a penalty of Rs. 20,000.

3. The assessee carried the matter before the Commissioner of Income Tax (Appeals) but it was unsuccessful.

4. Before the Tribunal, the orders of the lower authorities were objected to and it was contended that the penalty was not justified. The Tribunal after considering the facts of the case and whatever submissions were made before it, found that the assessee did not file an estimate of income u/s 209A(1)(b) of the Act as it believed that after taking into account the benefit of set off of business loss against the income under other heads there would be no taxable income. The Tribunal has further taken the view that the Income Tax Officer assessed the assessee's income at a positive figure by mainly denying the assessee the benefit of set off claimed by it which is not conclusive of the matter. The Tribunal has also accepted the submissions made by the assessee's counsel that the matter relating to the assessee's claim for set off of loss under the head "Share dealing" against other income is the subject-matter of reference to this court u/s 256(2) of the Act and a question of law is, therefore, involved in the assessee's case and this court has directed the Tribunal to refer the question of law to it for its opinion. The Tribunal, therefore, has taken the view that the bona fides of the assessee cannot be doubted. As a result, the penalty levied by the Income Tax Officer and upheld by the Commissioner of Income Tax (Appeals) has been cancelled.

5. It has been contended on behalf of the Revenue that in the facts and circumstances of the case penalty u/s 273(2)(b) is not exigible.

6. It has further been submitted on behalf of the Revenue that notwithstanding the loss incurred, the assessee became liable for tax owing to the application in its case of the Explanation to Section 72. It has further been contended that there could have been no manner of doubt that the appellant's business during the year consisted in the purchase and sale of shares of other companies.

7. It has further been argued that there is no plausible explanation for not filing an estimate in terms of provision of Section 209A(1)(b).

8. In support of the respective contentions the following decisions were cited from the Bar.

9. Cement Marketing Co. of India Ltd. Vs. Assistant Commissioner of Sales Tax, Indore and Others, . Jeewanlal (1929) Ltd. v. ITO [1980] 130 ITR 405 ; Income Tax Officer and Others Vs. Burmah Shell Oil Storage and Distributing Co. of India Ltd., . In the case of Cement Marketing Co. of India Ltd. Vs. Assistant Commissioner of Sales Tax, Indore and Others, , of the said report, the Supreme Court observed as follows :

"The next question that arises for consideration is whether the Assistant Commissioner of Sales Tax was right in imposing penalty on the assessee for not showing the amount of freight as forming part of the taxable turnover in its

returns. The penalty was imposed u/s 43 of the Madhya Pradesh General Sales Tax Act, 1958, and Section 9, Sub-section (2), of the Central Sales Tax Act, 1956, on the ground that the assessee had furnished false returns by not including the amount of freight in the taxable turnover disclosed in the returns. Now, it is difficult to see how the assessee could be said to have filed "false" returns, when what the assessee did, namely, not including the amount of freight in the taxable turnover, was under a bona fide belief that the amount of freight did not form part of the sale price and was not includible in the taxable turnover. The contention of the assessee throughout was that on a proper construction of the definition of "sale price" in Section 2(o) of the Madhya Pradesh General Sales Tax Act, 1958, and Section 2(h) of the Central Sales Tax Act, 1956, the amount of freight did not fall within the definition and was not liable to be included in the taxable turnover. This was the reason why the assessee did not include the amount of freight in the taxable turnover in the returns filed by it. Now; it cannot be said that this was a frivolous contention taken up merely for the purpose of avoiding liability to pay tax. It was a highly arguable contention which required serious consideration by the court and the belief entertained by the assessee that it was not liable to include the amount of freight in the taxable turnover could not be said to be mala fide or unreasonable. What Section 43 of the Madhya Pradesh General Sales Tax Act, 1958, requires is that the assessee should have filed a "false" return and a return cannot be said to be "false" unless there is an element of deliberateness in it. It is possible that even where the incorrectness of the return is claimed to be due to want of care on the part of the assessee and there is no reasonable explanation forthcoming from the assessee for such want of care, the court may, in a given case, infer deliberateness and the return may be liable to be branded as a false return. But where the assessee does not include a particular item in the taxable turnover under a bona fide belief that he is not liable so to include it, it would not be right to condemn the return as a "false" return inviting imposition of penalty. This view which is being taken by us is supported by the decision of this court in Hindustan Steel Ltd. Vs. State of Orissa, where it has been held "even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute . . ." It is elementary that Section 43 of the Madhya Pradesh General Sales Tax Act, 1958, providing for imposition of penalty is penal in character and unless the filing of an inaccurate return is accompanied by a guilty mind, the section cannot be invoked for imposing penalty. If the view canvassed on behalf of the Revenue were accepted, the result would be that even if the assessee raises a bona fide contention that a particular item is not liable to be included in the taxable turnover, he would have to show it as forming part of the taxable turnover in his return and pay tax upon it on pain of being held liable for penalty in case his contention is ultimately found by the court to be not acceptable. That surely could never have been intended by the Legislature.

We are, therefore, of the view that the assessee could not be said to have filed "false" returns when it did not include the amount of freight in the taxable turnover shown in the returns and the Assistant Commissioner of Sales Tax was not justified in imposing penalty on the assessee u/s 43 of the Madhya Pradesh General Sales Tax Act, 1958, and Section 9, Sub-section (2), of the Central Sales Tax Act, 1956."

10. We may take note of the judgment of the Division Bench of this court in the case of Jeewanlal (1929) Ltd. Vs. Income Tax Officer, "J" Ward and Another, . In the aforesaid case for the assessment year 1970-71, the petitioner filed an estimate of its income u/s 212 of the Income Tax Act, 1961, at a certain figure. On December 6, 1969, the petitioner filed another estimate of its income. After the petitioner had filed the second estimate of its income, on March 18, 1970, the Income Tax Officer, for the first time, held that receipts from sale of import entitlements were revenue receipts in connection with the return filed by the petitioner for the assessment year 1965-66. The petitioner, thereafter, on September 28, 1970, filed a revised return of income for the assessment year 1970-71. In the meantime, the petitioner had preferred an appeal to the Appellate Assistant Commissioner against the assessment made by the Income Tax Officer for the year 1965-66. The Appellate Assistant Commissioner, by his order dated February 3, 1972, affirmed the order of the Income Tax Officer, which, on further appeal, was affirmed by the Tribunal. Thereafter, a reference was made to the High Court which was pending. On August 23, 1972, the petitioner filed a second revised return deducting therefrom the amounts received on account of receipt from sale of import entitlements and the receipt by way of cash assistance from the Government of India on the ground that they were not revenue receipts and had been wrongly included in the original return. The two receipts were disclosed by the petitioner in its return in Part "D" thereof as not being taxable. But these two amounts had not been included by the assessee in his estimate of advance tax filed u/s 212. The Income Tax Officer issued a notice to the petitioner u/s 273(1)(a) read with Section 274 to show cause why penalty should not be levied for having filed an untrue estimate. The petitioner filed a writ petition challenging the notice. A single judge held that for the purpose of the issue of a notice u/s 273 it was sufficient if there was tentative and prima facie satisfaction which would justify embarking on an enquiry as to whether the assessee was guilty of the offence mentioned in Section 273, that it could not be said that there were no materials at all even to embark upon an enquiry as to whether the assessee knowing it to be false, or having reason to believe that the estimate was not true, had filed an inaccurate estimate, that in the years prior to the relevant assessment year, the Appellate Assistant Commissioner had held that the receipts were revenue receipts and the auditors of the assessee had advised the assessee that they were revenue receipts, and that, therefore, it could not be said that there were no materials for tentative satisfaction sufficient enough to entitle the Income Tax Officer to embark on an enquiry whether the petitioner was guilty of the offence mentioned

in Section 273(a) of the Act and dismissed the writ petition. On appeal to the Division Bench it was held, reversing the decision of the single judge, (i) that the judge had completely overlooked the fact that when the petitioner had filed its revised estimate of advance tax on December 5, 1969, the appeal that was preferred by the petitioner relating to the assessment year 1965-66 had not been disposed of by the Appellate Assistant Commissioner and the same was disposed of on February 3, 1972, i.e., long after the petitioner had filed its revised estimate of advance tax. Therefore, that material was not present before the Income Tax Officer as the single judge had thought, (ii) That though the auditors in their report for 1964 had expressed an opinion that cash assistance and import entitlements were revenue receipts and hence taxable, the directors, in their report, did not accept the opinion of the auditors that the two amounts were revenue receipts and were accordingly taxable. In the subsequent years also the directors disagreed with the opinion of the auditors. Therefore, the petitioner had bona fide believed in good faith that the two amounts were not revenue receipts and, as such, they were not taxable, (iii) That, therefore, the notice issued to the petitioner was not valid.

11. Our attention was also drawn to the judgment and decision in the case of Income Tax Officer and Others Vs. Burmah Shell Oil Storage and Distributing Co. of India Ltd., , observed as follows :

"We have considered the arguments advanced by both the parties. The learned judge of the court of the first instance in his judgment has set out in detail the arguments of the parties advanced before him, His Lordship after considering the contentions of the respective parties for reasons recorded in detail in the judgment allowed the application of the respondent herein. We respectfully agree with the reasonings of the learned judge of the court of the first instance. As will appear from the judgment, the learned judge has dealt in great detail with the contentions of the parties and has given his reasons in great detail and since we fully agree with and accept the reasons given by the learned judge of the court of the first instance for avoiding prolixity and repetition, we refrain from giving our reasons in detail. We, however, say that in the instant case, the respondent-company has disclosed all the necessary materials, papers and documents before the assessing authority and raised various legal contentions in support of its claim for devaluation loss and development rebate and depreciation at an enhanced rate. The claims and contentions of the respondent were rejected by the Income Tax Officer which were upheld by the Appellate Assistant Commissioner. The determination of the above questions is now pending before the Tribunal in the appeal before it. Therefore, in the facts and circumstances of this case, when the respondent-company had disclosed all the necessary papers and documents and raised legal contentions and when such contentions were not accepted, it cannot be said that there were materials before the authority concerned upon which he could base his satisfaction that there was concealment of income or furnishing of inaccurate particulars of income by the assessee. As, in the facts and circumstances of this case, the materials necessary for the

formation of the required satisfaction of the authority concerned are absent and the conditions precedent for invoking penalty proceedings are also absent. It is true that the giving of notice is not a jurisdictional factor but when, in the facts and circumstances of this case, the materials to support the required satisfaction which is a condition precedent for exercise of the jurisdiction and power of initiating penalty proceedings are also absent, the court should in exercise of its power and discretion under Article 226 of the Constitution interfere for the sake of justice. In the facts and circumstances of this case, we are satisfied and also agree with the learned judge of first instance that the authority concerned does not have any jurisdiction to exercise the power to initiate proceedings for the imposition of any penalty on the respondent-company. The conditions for imposition of such penalty stipulated in Section 271 for initiation of penalty proceedings, in the facts and circumstances of this case, are non-existent. We also agree with the learned judge of the court of first instance that the notices may not be statutory notices but it is on the basis of the said notices that the penalty proceedings against the respondent-company have been initiated and are being continued. In the above circumstances, in our view, it has been rightly held by the learned judge of the court of first instance that the court in the exercise of its discretion under Article 226 of the Constitution should interfere."

12. The principle is thus well-entrenched that the condition precedent for the very initiation of penal proceedings is that there must be deliberate-ness in not abiding by a legal requirement and bona fide belief as to non-applicability of a provision precludes initiation of a such proceeding.

13. Considering the facts and circumstances of this case, it appears to us that the assessee did not file an estimate of income u/s 209A(1)(b) of the Act as it believed that after taking into account the benefit of set off of business loss against the income under other heads there would be no taxable income. The assessee had bona fide reasons to believe that it had no taxable income and as such it was not liable to file an estimate of advance tax.

14. In our opinion, the Tribunal was justified in taking the view that the Income Tax Officer assessed the assessee's income at a positive figure by mainly denying the assessee the benefit of set off claimed by it which is not conclusive of the matter. The Tribunal has also accepted the submissions made by the assessee's counsel that the matter relating to the assessee's claim for set off of loss under the head "share dealing" against other income is the subject-matter of reference to this court u/s 256(2) of the Act and a question of law is, therefore, involved in the assessee's case and this court has directed the Tribunal to refer the question of law to it for its opinion. The Tribunal was justified in taking the view that the bona fides of the assessee cannot be doubted. As a result, the penalty levied by the Income Tax Officer and upheld by the Commissioner of Income Tax (Appeals) and accordingly, has been cancelled.

15. Accordingly, both the questions are answered in the affirmative and in favour of the assessee.

16. There will be no order as to costs.

Ajit K. Sengupta, J.

17. I agree.