

(1993) 10 OHC CK 0003
In the Orissa High Court
Case No : S.J.C. No's. 22 and 23 of 1990

Commissioner of Income Tax

APPELLANT

Vs

Permilla Singh and Co.

RESPONDENT

Date of Decision : 08-10-1993

Acts Referred:

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

Citation : (1994) 116 CTR 466 : (1994) 207 ITR 887

Hon'ble Judges : D.M. Patnaik, J;A. Pasayat, J

Bench : Division Bench

Advocate : A.K. Ray, for the Appellant; P.K. Misra, P.K. Jena, A.K. Panda, S.A. Khan and P.K. Harichandan, for the Respondent

Judgement

A. Pasayat, J.—These two reference applications are interlinked and, therefore, are disposed of by this common judgment which shall govern each one of them.

2. On the basis of an application u/s 256(2) of the Income Tax Act, 1961 (in short, "the Act"), filed by the Revenue and pursuant to the direction given by this court, the Income Tax Appellate Tribunal, Cuttack Bench (in short, "the Tribunal"), has referred the following question for adjudication by this court :

"Whether, on the facts and in the circumstances of the case and in view of the provisions of Section 271(2), penalty is to be calculated treating the firm as an unregistered firm when the assessee-firm committed default in submission of returns and rendered itself liable for penalty u/s 271(l)(a) ?"

3. In our view the question referred needs a slight modification, and accordingly we reframe the same for adjudication. The reframed question reads as follows :

"Whether penalty can be levied u/s 271(1)(a) of the Income Tax Act, 1961, on a registered firm by treating it as an unregistered firm in terms of Section 271(2) of the Act when no tax is payable by the registered firm after giving credit to advance tax paid and/or tax deducted at source ?"

4. The assessment years involved are 1980-81 and 1982-83. Messrs. Permilla Singh and Co. (hereinafter referred to as "the assessee") is a partnership firm, which filed its returns of income before the Income Tax Officer, Bhawanipatna. The returns were filed after the due date prescribed u/s 139 of the Act. Penal proceedings were initiated u/s 271(1)(a) for four years, i.e., 1976-77, 1980-81, 1981-82 and 1982-83. Penalty of Rs. 13,920, Rs. 17,860, Rs. 10,480 and Rs. 6,110 were levied for the assessment years in question. The assessee filed appeals before the Appellate Assistant Commissioner of Income Tax, Berhampur Range, Berhampur. Taking note of the provisions of Section 271(3)(d) of the Act, direction was given by the first appellate authority to restrict the amount of penalty to twice the amount of tax sought to be evaded as a registered firm. Both the assessee and the Revenue filed appeals before the Tribunal. In the appeals filed by the Revenue, the assessee filed cross-objections. The specific stand of the assessee before the Tribunal was that no penalty was imposable as the advance tax paid by the assessee covered the entire amount of tax assessed as registered firm. To prop up its submission reliance was placed on a decision of the apex court in the case of Ganesh Dass Sreeram Vs. Income Tax Officer, "A" Ward, Shillong and Others, . The Revenue's stand was that the said case had no application and the provisions of Section 271(2) would be rendered nugatory if the plea is accepted. The Tribunal noticed that the decision in Ganesh Dass Sreeram Vs. Income Tax Officer, "A" Ward, Shillong and Others, related to levy of interest u/s 139(8) of the Act, but its ratio was relevant. Reliance was also placed on a decision of the Rajasthan High Court in Commissioner of Income Tax Vs. Builders Engineers Co., . It was held that where advance tax paid covers the entire amount of assessed tax, penalty u/s 271(1)(a) is not leviable. Accordingly, the orders imposing penalty were set aside, and the matter was remitted back to the file of the Income Tax Officer to make fresh adjudication in the light of the observations made. This direction was given keeping in view the assessee's specific claim that the tax deducted at source exceeded the amounts of tax assessed. The appeals filed by the assessee were accordingly disposed of, but its cross-objections and the appeals filed by the Revenue were dismissed as infructuous, though the delay in filing the appeals by the Revenue was condoned. A reference was sought for by the Revenue u/s 256(1) of the Act. The Tribunal was of the view that the apex court's decision put the matter beyond a shadow of doubt and, therefore, there was no necessity for making a reference. The Revenue moved this court for a direction u/s 256(2) of the Act. That is how these reference applications are before us.

5. Learned counsel for the Revenue has submitted that the view of the apex court in Ganesh Dass Sreeram Vs. Income Tax Officer, "A" Ward, Shillong and Others, related to levy of interest u/s 139(8) of the Act, and the ratio of that decision has no application to the case of penalty u/s 271(1)(a). Learned counsel for the assessee, on the other hand, submitted that the provisions are in pari materia and, therefore, the ratio of Ganesh Dass Sreeram Vs. Income Tax Officer, "A" Ward, Shillong and Others, applies to the case of penalty u/s 271(1)(a).

6. For resolution of the controversy, a reference to sections 139(8) and 271(1), so far as they are relevant is necessary.

"139. Return of income.--

(8) Notwithstanding anything contained in Clause (iii) of the proviso to Sub-section (1), the Income Tax Officer may, in such cases and under such circumstances as may be prescribed, reduce or waive the interest payable by any person under any provision of this section."

"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

(b) has without reasonable cause failed to comply with a notice under Sub-section (1) of Section 142 or Sub-section (2) of Section 143, or

(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,--

(i) in the cases referred to in Clause (a), in addition to the amount of the tax, if any, payable by him, a sum equal to two per cent. of the tax for every month during which the default continued, but not exceeding in the aggregate fifty per cent. of the tax ;

(ii) in the case referred to in Clause (b), in addition to any tax payable by him, a sum which shall not be less than ten per cent., but which shall not exceed fifty per cent. of the amount of the tax, if any, which would have been avoided if the income returned by such person had been accepted as the correct income ;

(iii) in the case 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.

Explanation.-- Where the total income returned by any person is less than eighty per cent. of the total income (hereinafter in this Explanation referred to as the correct income) as assessed u/s 143 or Section 144 or Section 147 (reduced by the expenditure incurred bona fide by him for the purpose of making or earning any income included in the total income but which has been disallowed as a deduction), such person shall, unless he proves that the failure to return the

correct income did not arise from any fraud or any gross or wilful neglect on his part, be, deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income for the purposes of Clause (c) of this sub-section."

7. The apex court in relation to levy of interest u/s 139(8) in Ganesh Dass Sreeram Vs. Income Tax Officer, "A" Ward, Shillong and Others, , observed as follows (at page 230):

"Before we part with these appeals, we think we should clarify one situation, namely, where the advance tax duly paid 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 allowed, regard being had to the fact that payment of interest is only compensatory in nature. As the entire amount of tax is paid by way of advance tax, the question of payment of any compensation does not arise."

8. The emphasis on "assessed tax" as appearing in Section 271(1) is of great relevance. Where the entire amount of tax has already been paid being deducted at source or paid in advance, the question of imposing any penalty on the assessed tax does not arise because no tax is actually due. The penalty which can be imposed 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. Thus, where no amount of tax remains to be paid on completion of the assessment, the "assessed tax" would be zero and any figure multiplied by zero would also be zero. Therefore, no penalty would be payable. The provisions of Sub-section (2) of Section 271 are attracted for quantification of the penalty only when it is imposable under Sub-section (1). In that event, the registered firm loses the benefit of registration, and the penalty for which it has become liable has to be calculated depriving it of the benefit of registration and treating it as an unregistered firm. While deciding the liability for penalty under Sub-section (1) effect has to be given to Sub-section (2) which comes into operation only to make the formula for calculating the penalty under Sub-section (1) workable. When the assessed tax is nil, it would be impracticable to impose penalty under Sub-section (2) of Section 271. Similar view expressed by the Rajasthan High Court in the case of Commissioner of Income Tax Vs. Builders Engineers Co., and by the Punjab and Haryana High Court in the case of Commissioner of Income Tax Vs. Harish Chand and Co., has our concurrence.

9. Our answer to the question referred is in the negative, in favour of the assessee and against the Revenue. No costs.

D.M. Patnaik, J.

10. I agree.