

(1982) 01 DEL CK 0004

In the Delhi High Court

Case No : Income Tax Reference No. 33 of 1976

Commissioner of Income Tax

APPELLANT

Vs

Pratap Singh

RESPONDENT

Date of Decision : 29-01-1982

Acts Referred:

Citation : (1982) 138 ITR 27

Hon'ble Judges : S. Ranganathan, J; Leila Seth, J

Bench : Division Bench

Advocate : G.C. Lalwani, Madan Lokur, K.K. Jain and P. Dayal, for the Appellant;

Judgement

S. Ranganathan, J.

(1) Two questions have been referred to this court u/s 256 of the Income Tax Act, 1961. They read as follows :

"1. Whether on the facts and in the circumstances of the case, the Tribunal was legally right in cancelling the penalty of Rs. 3,521 levied u/s. 273 of the Income Tax Act, 1961 ?

2. Is not the Tribunal's order vitiated in view of the amendment to section 275 brought by Act 42 of 1970 with effect from 1-4-1971?"

(2) The questions referred to us arise out of the assessment of Pratap Singh of Nabha for the assessment year 1965-66. The assessed had been served with a notice u/s 210 of the Act raising a demand of advance tax of Rs. 1,89,122 payable in Installments as provided for in the section. The assessed, however, filed on 15-3-1965 an estimate u/s 212(3) estimating his income at Rs. 36,000 and stating that since the tax deducted at source was more than the tax payable on the total income as estimated there was no liability to pay advance tax. Eventually the assessed filed a return showing an income of Rs. 1,04,098 and the assessment was completed on a total income of Rs. 1,23,981 giving rise to a net tax demand of Rs. 41,846 and a demand of interest of Rs. 8,447. This

assessment was completed on 28th February, 1969. Simultaneously the Income Tax Officer issued a notice u/s 273 read with section 274 seeking to penalise the assessed for having filed an under-estimate of advance tax which the assessed knew or had reason to believe to be untrue.

(3) Subsequently the assessment was re-opened u/s 147(b) in April, 1969 in order to disallow a business loss in dairy farming which has been claimed by the assessed and wrongly allowed at the time of original assessment. The re-assessment was completed on 28-4-1970 disallowing this loss of Rs. 7,176 and raising the total income to Rs. 1,31,157. Again at the time of completion of this reassessment the Income Tax Officer issued a fresh notice u/s 273 read with section 274 on 27th April, 1970.

(4) On 2nd August, 1972 the Income Tax Officer passed an order u/s 273 imposing a penalty of Rs. 3,521 on the assessed. He pointed out that according to the estimate filed by the assessed there was no advance tax payable at all whereas the assessed had filed a return of income on the basis of which a net tax of Rs. 26,275 was payable by the assessed.

(5) The assessed preferred an appeal to the Appellate Assistant Commissioner contending that the penalty order passed on 2nd August, 1972 was illegal because it had been passed beyond the statutory time limit prescribed u/s 275. It was submitted that the assessment having been completed originally on 28-2-1969 the penalty order should have been passed on or before 28th February, 1971. The appellate Assistant Commissioner, however, rejected this contention. He pointed out that penalty proceedings had been initiated in the course of proceedings u/s 148 on 27-4-1970 and that the period of limitation had to be counted from the date of completion of the re-assessment as the starting point. That apart section 275 which had originally prescribed a limitation of two years from the date of the assessment order had been amended with effect from 1-4-1971 substituting a period of two years from the end of the financial year in which the assessment had been completed. According to the Appellate Assistant Commissioner this amendment was applicable to the present case. Since the original two years period counted from 28-4-1970 had not expired by the 1st April, 1971 on which date the amendment came into effect. Therefore, according to him, the Income Tax Officer could pass the penalty order within a period of two years from the end of the financial year in which the re-assessment had been completed i.e., at any time on or before 21-3-1973. The penalty order was, therefore, within time. In this view of the matter the assessed's appeal was dismissed.

(6) However, on further appeal the assessed was successful before the Tribunal. The Tribunal pointed out that the original assessment having been completed on 28-2-1969 the order of penalty should have been passed on or before 28-2-1971. The Tribunal did not accept the plea of the department that the amendment of section 275 would be applicable in the present case. The Tribunal did not accept the plea that the limitation should be counted from the date of the

close of the financial year and not from the point of initiation of penalty proceedings. This was particularly so because even if the re-assessment proceedings were also to be taken into account they had been completed on 28-4-1970 and the penalty order should have been passed within two years from that date. According to the Tribunal, Therefore, the penalty order was beyond time and hence without jurisdiction. In the view taken by it the Tribunal did not consider the merits of the assessed's case regarding the law of penalty. It cancelled the penalty imposed and allowed the assessed's appeal.

(7) Aggrieved by the order of the Tribunal the Commissioner of Income Tax has sought a reference to this court on the two questions which have been set out earlier.

(8) Learned counsel for the department, Shri Lalwani, pointed out that the Income Tax Officer had issued notice u/s 273 not merely at the time of the completion of the original assessment on 28-2-1969 but also at the time of completion of the re-assessment on 28th April, 1970. On the law as it then stood the penalty proceedings initiated on 28-4-1970 had to be completed within two years from the re-assessment, namely, on or before 28th April, 1972. However, in the meantime section 275 had been amended extending the period of limitation available to the department in such cases. This, learned counsel contended, was a purely procedural amendment and it could be availed of by the department in all cases even though the penalty notice might have been issued prior to 1-4-1971 subject to the only condition that the limitation period prescribed in respect of those proceedings under the earlier sections had not lapsed on or before 31-3-1971. In the present case the period of limitation prescribed originally would have come to an end only on 28-4-1972. But since by this time the amendment had come into force the department was entitled to avail itself of the extended period of limitation provided for by the amended section and was within its rights in passing a penalty order at any time on or before 31-3-1973. Learned counsel submitted that this was the unanimous view taken by all the High Courts and he referred to the following decisions : Commissioner of Income Tax Vs. Bhikari Charan Panda, Commissioner of Income Tax Vs. Soubhagya Manjari Devi, , The Additional Commissioner of Income Tax, Andhra Pradesh, Hyderabad Vs. Watan Mechanical and Turning Works, Hyderabad, . Commissioner of Income Tax Vs. Royal Motor Car Co, . Commissioner of Income Tax (Central), Madras Vs. M. Nagappa, . Kerala Oil Mills v. Commissioner of Income Tax 1980 121 Itr 255 and Commissioner of Income Tax Vs. Sadhu Ram, . He, here fore ,submitted that the view taken by the Tribunal is patently incorrect and that the penalty order should have been upheld by the Tribunal.

(9) Mr. K. K. Jain, learned counsel for the assessed repelled the contentions of the department in two ways. His principal stress was on the fact that so far as the penalty u/s 273 is concerned such penalty proceedings could be initiated only at the time of the "regular assessment". Learned counsel contended that a

second assessment made u/s 147 of the Act is not a "regular assessment" within the meaning of section 273. His principal contention, Therefore, was that the penalty proceedings initiated on 27-4-1970 were wholly without jurisdiction. This being so only the penalty notice issued on 28-2-1969 could be taken note of and counted from the date of the original assessment order the period of limitation had expired on 28-2-1971 and did not get revived, even on the department's argument, by the subsequent amendment effective from 1-4-1971. In support of his contention that the expression "regular assessment" did not take within its purview an assessment made u/s 147 of the Act Shri Jain relied on the following decisions : Gates Foam and Rubber Co. Vs. Commissioner of Income Tax, , Commissioner of Income Tax Vs. Ram Chandra Singh, , SMT. KAMLA VATI Vs. COMMISSIONER OF Income Tax (CENTRAL), PATIALA., and Trustees of H.E.H. Nizam's Religious Endowment Trust Vs. Income Tax Officer, A-Ward and Another, . He also referred to the decision of the Madras High Court in M. Rm. M.M.N. Natarajan Chettiar Vs. Income Tax Officer, III Additional Circle, Karaikudi, and Another,

(10) Having rested his case principally on the above contention Shri Jain also contended, alternatively, relying on the decision of the Supreme Court in the case of Brij Mohan Vs. Commissioner of Income Tax , New Delhi, , that in all matters of penalty the law which would govern the present case would be the law on the date on which the offence was committed. According to the department the assessed's offence consisted in deliberately understating its income subject to advance tax and this default or offence had been committed some time in 1965. That being so all issues connected with the penalty proceedings whether they be regarding the quantum of the assessment, the authority authorised to impose penalty or the period of limitation have to be judged only on the provisions of the law as they stood in 1965. Looked at from this point of view the penalty order passed on 2-8-1972 was clearly out of time even if reckoned from the date of the order of reassessment, namely, 28-4-1970. For these reasons, learned counsel contended, the view taken by the Tribunal was a correct view and we should answer the reference accordingly.

(11) We are of opinion that the first contention of Shri Jain should prevail. Section 273 under which the impugned penalty order has been passed contemplates the initiation of proceedings "in the course of any proceedings in connection with the regular assessment for the assessment year". The expression "regular assessment" is defined in section 2(40) as "the assessment made u/s 143 or section 144" and the term "assessment" has itself been defined in section 2(8) as including re-assessment as well. The penalty u/s 273 is imposed for the failure of the assessed to comply with his obligations relating to the payment of advance tax which are outlined in Chapter XVII-C of the Act The expression "regular assessment" is used not only in the context of the penal provision in section 273 but also in the context of the interest payable by or to an assessed under the provisions of section 214 to 217 of the Act.

(12) This Bench had occasion to consider the scope of this expression "regular assessment" in some detail in the context of the interest provision in the case of National Agricultural Co-operative Marketing Federation of India Ltd. Vs. Union of India and others, . Some of the decisions which have been cited by Shri Jain have been considered by us in detail in the said judgment. We have pointed out in that judgment that there are two phases in the assessment of an assessed under the Act: (i) the phase of advance tax payment or payment of tax by deduction at source and the other phase of payment of the tax on the basis of an assessment made by the Income Tax Officer under the Act. We have pointed out that the first phase, namely, the payment of advance tax has material significance only till the initial or first assessment is made. But it has no separate existence by itself once an Assessment is made and a tax demand is made on the assessed. We have agreed with the basic concept of the advance tax provision as outlined by Chagla C.J. in Sarangpur Cotton Manufacturing Co. Ltd. Vs. Commissioner of Income Tax, Bombay North, and Pathak J. (as he then was) in the case of Sir Shadilal Sugar and General Mills Ltd. Vs. Union of India (UOI) and Another, . Though the question raised before us in that decision was whether the modification of an assessment consequent on appellate orders could be treated as a regular assessment it was necessary for us to consider while discussing the scope of the expression "regular assessment" how far a re-assessment made u/s 148 read with sections 143 or 144 could be described as a regular assessment for the purposes of the Act. We have noticed the decision of the Madras High Court in M. Rm. M.M.N. Natarajan Chettiar Vs. Income Tax Officer, III Additional Circle, Karaikudi, and Another, where it was held that an assessment completed u/s 34 to modify an assessment already made on the assessed could not be described as a "regular assessment" and the subsequent decision of the same High Court in K. Gopalaswami Mudaliar v. Fifth Addl. Ito 1963 49 Itr 323 which had held that where a first or initial assessment was itself completed by reference to the provisions of section 34 of the 1922 Act it could well be described as a regular assessment. In the context of these decisions we have pointed out at page 947 :

"(I) The basic concept, in our opinion, was originally outlined in the 1922 Act, and this concept has not really changed in spite of various amendments effected to the section over the period of years. The general scheme of the Act is to collect tax after it is quantified on the basis of initial or the first assessment and the demand notice issued in pursuance thereof. This, in our opinion, is the regular assessment contemplated by the Act whether it is completed under s. 23(3)(4) ss. 143, 144, of the Acts, or whether it is made under the above sections read with s. 34/147 of the Acts."

and again at page 948 :

"(IV) Again for purposes of ss. 214, 215 and 273, there is no reason why an assessment made for the first time under s. 148 should be outside the purview of that section. We agree in this respect with the decisions of the Bombay High

Court in Deviprasad Kejriwal Vs. Commissioner of Income Tax (Central), Bombay, and of the Madras High Court in K. Gopalaswami Mudaliar Vs. Fifth Additional Income Tax Officer, Coimbatore, and Others., . With respect we are unable to agree with the decisions of the Kerala High Court in Gates Foam and Rubber Co. Vs. Commissioner of Income Tax, and of the Punjab High Court in Smt. Kamla Vati v. Cit (1978) 3 Itr 248."

At page 950 we have pointed out that liberally construed the expression "regular assessment" would take in not niecely the first or initial assessment in a particular case but also all assessments supplementing it, rectifying it, modifying it or revising it as a consequence of the appellate orders or for other reasons. But the context of the advance tax provisions this expression could not be interpreted in a very liberal manner and should be restricted in its application to the first or initial assessment made under the Act and not subsequent modifications thereof. In other words while we felt ourselves unable to agree with the decisions of Kerala High Court and Punjab High Court earlier referred to (namely, Gates Foam and Rubber Co. Vs. Commissioner of Income Tax, , SMT. KAMLA VATI Vs. COMMISSIONER OF Income Tax (CENTRAL), PATIALA., we agreed with the decision of the Bombay High Court in Deviprasad Kejriwal Vs. Commissioner of Income Tax (Central), Bombay, and of the Madras High Court in K. Gopalaswami Mudaliar Vs. Fifth Additional Income Tax Officer, Coimbatore, and Others., . We may notice here that in the case of Deviprasad Kajriwal the Bombay High Court went slightly further and held that a supplemental assessment made u/s 34/147 would be a regular assessment for purposes of section 273. We have not gone to this extent but have qualified ourselves and restricted ourselves only to saying that an assessment u/s 34/147 would be a regular assessment for the purposes of these provisions provided it is the first or initial assessment made on the assessed. We have arrived at this conclusion on the basis of the principle earlier set out, namely, that the advance tax. phase comes to an end as soon as an assessment is made under the Act and that for the purposes of working out the purpose of Chapter XVII-C of the Act one should not travel outside to a supplemental assessment or the revision or modification of an assessment earlier made as that might lead to extreme consequences. Summing up the position, therefore. we have already decided in the case of National Agricultural Cooperative Marketing Federation v. Uoi (1981- 130 Itr 928) that a regular assessment for purposes of sections 214, 215 and 273 would be the initial or first regular assessment under the Act. This being so we find force in the contention of Shri Jain that so far as the present case is concerned the penalty proceedings u/s 273 could have been validly initiated only in the course of the assessment proceedings which culminated in an assessment on 28th February, 1969. The proceedings initiated on 27-4-1970 were, in our opinion, incompetent and beyond the jurisdiction of the Income Tax Officer and have to be ignored. That being so under the law as it then stood the penalty proceedings initiated on 28-2-1969 should have culminated in a penalty order on or before 27th February, 1971. But no such order was passed in this case before that date

nor had the amendment of section 275 become effective before that date. No question, Therefore, arises of the amendment extending the period of limitation available to the department. In our opinion, Therefore, the Tribunal was right in holding that the penalty order was barred by limitation.

(13) We may also look at the matter from a slightly different point of view. In the present case the assessed is being penalised for having filed an under-estimate of advance tax. The satisfaction of the Income Tax Officer that the assessed had so under-estimated his tax and paid much less advance tax than it should have had been reached in the course of the original assessment proceedings which ended in the assessment order dated 28-2-1969. The re-assessment proceedings were initiated only to disallow a certain item of loss and in the course of these proceedings there was no occasion for the Income Tax Officer to have reached at any conclusion that the assessed had under-estimated and underpaid the advance tax. One can understand such a satisfaction being reached in a case where the original assessment had been made on a figure which was not considerably different from the figure of income on which the assessed had paid advance tax but the re-assessment has made the Income Tax Officer aware of the assessed's default in this respect. For instance if in the present case the Income Tax Officer had completed the assessment on the basis of the figures for which the advance tax had been paid and the re-assessment had been on much higher footing one could say that the satisfaction regarding the offence u/s 273 having been committed was reached by the Income Tax Officer only at the time of re-assessment. But in this case the Income Tax Officer's reason for coming to the conclusion that the penalty u/s 273 was attracted was that the income returned by the assessed was much more than the income on which the advance tax was paid. This satisfaction came to the Income Tax Officer at the time of original assessment and there was no question of this satisfaction being arrived at by the Income Tax Officer for the first time in the course of the proceedings for re-assessment which could have justified the issue of a fresh penalty notice u/s 273. From this point of view also it would appear to us that the assessment order on the basis of which the limitation period has to be reckoned is only the assessment order dated 28-2-1969 and not the revised assessment order dated 28-4-1970.

(14) In the view we have taken on the first contention put forward by the learned counsel for the assessed it is really unnecessary for us to consider the second contention. However, it seems to us that on the second contention the learned counsel for the assessed cannot succeed in view of the principles laid down the unanimous rulings of several High Courts which have been relied upon by the learned counsel for the department. The learned counsel for the assessed sought to meet these judgments by relying on the decision of the Supreme Court in the case of Brij Mohan 1980 120 Itr 1. It is true that in the said case the Supreme Court laid down that so far as penalty matters are concerned the substantive law to be applied will be the law as it was in force on the date on which the offence was committed. But this principle laid down by the Supreme

Court is applicable only in respect of the substantive law and not in respect of procedural law. As pointed out by the several decisions referred to by Shri Lalwani it is well settled that the procedural law will be effective from the date of its coming into force and that it will be applicable even in respect of proceedings instituted earlier unless those proceedings have lapsed or have come to an end as a result of the provisions earlier in force before the date when the amendment came into operation. In the present case if the time limit for the penalty order is to be reckoned from 28-2-1969 then the rights of the department to pass a penalty order came to an end on 28-2-1971 much before the amendment became effective and could not be revived by the amendment in question. On the other hand if the departmental counsel can be said to be right in saving that the limitation has to be reckoned from the date of the reassessment order, we would have to hold that, though on the date of the assessment order as well as on the date when advance tax estimate was filed the period of limitation was a period of two years from the date of the assessment order, that period had got extended as it had not expired by the date on which the amendment became effective. The amendment would then have had to be held to be operative in the assessed's case and the department's right to impose the penalty up to 31st March, 1973 upheld. We are, Therefore, of opinion that if limitation had to be reckoned from the date of the re-assessment order then the penalty order would have been within time but that, since, for reasons stated earlier time has to be counted from 28-2-1969, the penalty order cannot be upheld.

(15) For the reasons discussed above, we answer the first question referred to us in the affirmative and the second question in the negative and in favor of the assessed. As we have rested our conclusion on a basis different from that adopted by the Tribunal in deciding the case and as one of the contentions of the department has been accepted, we do not think that this is a case in which the department should be asked to pay the costs of the assessed. We, Therefore, make no order as to costs.