

(1980) 07 CAL CK 0042

In the Calcutta High Court

Case No : Income-tax Reference No. 561 of 1971

Commissioner of Income Tax

APPELLANT

Vs

Priya Gopal Bishoyee

RESPONDENT

Date of Decision : 17-07-1980

Acts Referred:

Income Tax Act, 1961 — Section 183, 271(1), 271(2)

Citation : (1981) 20 CTR 242 : (1981) 127 ITR 778

Hon'ble Judges : Sudhindra Mohan Guha, J; Sabyasachi Mukharji, J

Bench : Division Bench

Advocate : R.C. Prasad, for the Appellant; Manas Banerjee, for the Respondent

Judgement

Sabyasachi Mukharji, J.—This reference arises out of the proceedings for the levy of penalty u/s 271(1)(a) of the I.T. Act, 1961. The ITO issued a notice u/s 159(2) of the Act on 28th August, 1963, for the assessment year 1963-64. The return was due on 1st October, 1963. The previous year was 1369 B.S. ending on 14th April, 1963. The assessee filed a return on 4th January, 1965, after a delay of a little over 15 months. It was a firm of three partners and was duly assessed as a registered firm. The ITO initiated penalty proceedings u/s 271(1)(a) read with Section 274 of the Act and issued a show-cause notice. The assessee filed a reply raising various objections. It is unnecessary for our present purpose to go into those objections as there are no materials on the point on which the reference has been made.

2. The ITO held that the assessee was liable to penalty, u/s 271(1)(a) of the Act, of Rs. 15,335, being 2% of the tax for every month during which the default had continued. He calculated this penalty on the basis of the tax due from an unregistered firm, as envisaged by Section 271(2) of the Act.

3. The assessee being aggrieved by the said order preferred an appeal before the AAC. The AAC dismissed the appeal.

4. The assessee thereupon preferred a further appeal before the Tribunal and

contended that the actual demand for tax was Rs. 5,657.44 and this had been paid long before the penalty came to be levied. In the premises, relying on the decision of this court in the case of Commissioner of Income Tax Vs. Vegetable Products Ltd., , it was urged on behalf of the assessee that the penalty leviable would be "nil". On the other hand, the contention of the revenue was that the penalty had been properly imposed by the ITO. The Tribunal referred to the decision of the Calcutta High Court and was of the opinion that the penalty leviable would be "nil".

5. On the aforesaid facts, the following questions have been referred to this court :

"(1) Whether in the case of a registered firm which was liable to penalty u/s 271(1)(a) read with Section 271(2) of the Income Tax Act, 1961, the principle of the decision in Commissioner of Income Tax Vs. Vegetable Products Ltd., , is applicable for computing the penalty ?

(2) If the answer to question No. 1 is in the affirmative whether the direction of the Tribunal in para. 2 of annexure " E " is proper and legal ? "

6. The Supreme Court in the case of The Commissioner of Income Tax, West Bengal 1, Calcutta Vs. Vegetables Products Ltd., , which affirmed the decision of this court reported in Commissioner of Income Tax Vs. Vegetable Products Ltd., , held that the tax payable was not the same thing as tax assessed. The tax payable was the amount for which a demand notice had been issued u/s 156 of the I.T. Act, 1961. In determining the tax payable, the tax already paid had to be deducted. The Supreme Court was of the view that the expression " the amount of tax, if any, payable by him " in the earlier part of Section 271(1)(a)(i) referred to the tax payable under a notice of demand. The words "the tax" in the latter part of the provision would only refer to " the tax ", if any, " payable " by the assessee mentioned in the earlier part of Section 271(1)(a)(i) of the Act. It was held, accordingly, that in calculating the penalty leviable u/s 271(1)(a)(i) of the I.T. Act, 1961, for failure to file the return of income for the assessment year 1960-61, within the time without reasonable cause, the amount paid by the assessee under provisional assessment u/s 23B of the Indian I.T. Act, 1922, had to be deducted from the amount of tax determined u/s 23(2) of that Act, in order to determine the amount of tax on which the computation of the penalty had to be based. If the court found that the language of a taxing provision was ambiguous or capable of more than one meaning, then, the court had to adopt that interpretation which favoured the assessee, more particularly so where the provision related to the imposition of penalty. The Supreme Court noted the divergence of judicial opinion on this point between the views held by the Mysore High Court (M.M. Annaiah Vs. Commissioner of Income Tax, Mysore,) and this court (Commissioner of Income Tax Vs. Vegetable Products Ltd.,) on the one hand and the Lahore High Court ((1938) 6 ITR 616) and the Delhi High Court (The Commissioner of Income Tax, Delhi Vs. Hindustan Industrial Corporation, New Delhi,) on the other and preferred the view enunciated by this court and

the Mysore High Court.

7. Subsequent to the decision of the Supreme Court, the Direct Taxes (Amendment) Act, 1974, which substituted Clause (i) of Section 271(1) of the I.T. Act, retrospectively, came into operation. By the said Act an Explanation was added to Section 271(1)(i) The Explanation provided as follows :

" Explanation.--In this clause " 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. "

8. Sub-section (2) of Section 271 provides that when a person liable to penalty is a registered firm or an unregistered firm which had been assessed under Clause (b) of Section 183 then, notwithstanding anything contained in the other provisions of this Act, the penalty imposable under Sub-section (1) shall be the same amount as would be imposable on that firm as if that firm were an unregistered firm. Therefore, for the purpose of imposition of penalty, the firm, even if it is registered, and if it has committed a default as contemplated u/s 271, it would be treated on the same basis as if it was an unregistered firm. In the case of an unregistered firm the tax in the circumstances would have been, as would be borne out from the facts on record, Rs. 15,805 but if it was a registered firm, then the tax payable would have been Rs. 5,657.44. Now, this sum of Rs. 5,657.44 had been paid on 20th September, 1967, while the order for the imposition of penalty was passed subsequent thereto on 26th June, 1969. Therefore, at the date when the imposition of penalty was made there would have been no assessed tax if it was a registered firm, but if it was an unregistered firm and for the purpose of determination of imposition of penalty it would be treated as an unregistered firm and if it is so treated, then the assessed tax must be treated for calculating it (the penalty) on the basis as if it was an unregistered firm and if that is so, then for every month during which the default had continued the assessee would be liable and the expression "for every month during which the default had continued" would not govern a period for which the tax had remained unpaid, but in determining the period during which the default had continued it (the period) is contemplated by Section 271(1)(a). In this case, default upon which penalty was imposed was the delay in submission of the return. Therefore, the fact is that payment of the assessed tax on the basis of a registered firm would not exonerate the assessee from the imposition of the penalty on the basis that it was an unregistered firm calculating the default for the month for which the default had continued.

9. In that view of the matter, question No. 1 must be answered in the negative and in favour of the revenue and, in that view of the matter, question No. 2 does not arise. In the facts and circumstances of the case, the parties will pay and bear their own costs.

Sudhindra Mohan Guha, J.

10. I agree.