

(1979) 01 MAD CK 0024

In the Madras High Court

Case No : Tax Case No. 93 of 1975 (Reference No. 76 of 1975)

Commissioner of Income Tax

APPELLANT

Vs

R. Chelladurai

RESPONDENT

Date of Decision : 17-01-1979

Acts Referred:

Income Tax Act, 1961 — Section 254, 254(2)

Citation : (1979) ILR (Mad) 277 : (1979) 118 ITR 108

Hon'ble Judges : Sethuraman, J; Balasubrahmanyam, J

Bench : Division Bench

Advocate : J. Jayaraman and Nalini Chidambaram, for the Appellant; K. Mani, for V. Ramachandran and V. Narayanamurthi, for the Respondent

Judgement

Sethuraman, J.—In compliance with the directions of this court in T.C.P. No. 8 of 1973, the Tribunal has referred the following questions :

1. Whether the Appellate Tribunal had jurisdiction in law to adjudicate upon the merits of the levy of penalty u/s 271(1)(c) of the Income Tax Act,

1961, and reduce the quantum while disposing of the miscellaneous application filed by the department for the only purpose of rectifying the

mistake of law committed in the appeal order dated January 5, 1968 ?

2. Whether the Appellate Tribunal having concluded in the appeal order dated January 5, 1968, that on merits the levy of penalty was justified was

right in reopening that issue while rectifying the mistake of law based on the department's miscellaneous application ?

2. The assessee is a proprietor of a Tamil magazine and a press. For the assessment year 1959-60, he filed a return some time prior to January 9,

1962. On January 9, 1962, as against a return of income of Rs. 17,606, he was assessed on a total income of Rs. 30,210. In the assessment a

sum of Rs. 12,000 which represents the aggregate of certain credits in the name of one Ratnaguruswamy was found to be bogus and this sum was

added as income in the assessment so as to increase it from Rs. 17,606 to Rs. 30,210. Penalty proceedings were duly started and the ITO was

satisfied that, in this case, the assessee had concealed the particulars of his income and the ITO levied a penalty of Rs. 5,000 u/s 271(1)(c) of the

Act. The AAC, on appeal reduced the penalty to Rs. 3,000. The assessee appealed against the said penalty so confirmed by the AAC; and when

the matter came before the Tribunal, the Tribunal followed certain decisions of the Bombay and Mysore High Courts which held that legally no

penalty was leviable, under the I.T. Act, 1961, where the assessment was completed under the Act of 1922. It may be stated at this stage that the

Indian I.T. Act of 1922 was in force up to 1st April, 1962, when the Income Tax Act of 1961 came into force. There is a provision in Section

297(2)(a) that where a return of income was filed before the commencement of this Act, by any person for any assessment year, proceedings for

the assessment of that person for that year had to be taken and continued as if this Act had not been passed. As the return was filed prior to April

1, 1962, the assessment had been completed under the Act of 1922. The Tribunal, following certain decisions of the High Courts, held that penalty

could not be levied under the Act of 1961 and that it could only be levied under the Act of 1922. As it had been levied under the Act of 1961, the

penalty levied was cancelled.

3. In the course of the order dated January 5, 1968, by which the appeal of the assessee was disposed of in the above manner, the Tribunal stated

in para. 4 of its order thus :

On merits, we are satisfied that the levy of penalty was fully justified. The credits in the name of Rathnaguruswamy were found to be bogus both

by the Appellate Assistant Commissioner and the Appellate Tribunal. There is, therefore, a clear case of concealment of income attracting the

provisions of Section 271(1)(c).

4. In the grounds of appeal by the assessee before the Tribunal, two points were taken relating to (1) the validity of the penalty order made under

the provisions of the 1961 Act ; and (2) the leviability of penalty and also the quantum thereof. It is with reference to the latter aspect that the

Tribunal found that it was satisfied that the levy of penalty was fully justified.

5. There was an application before the Tribunal by the ITO who was the respondent in the appeal before the Tribunal. This application came to be

filed under the following circumstances. The Tribunal, as stated earlier, followed certain decisions of the Mysore and the Bombay High Courts. The

Supreme Court dealt with the identical question of the levability of penalty under the Act of 1961 in two decisions in Jain Bros. and Others Vs.

The Union of India (UOI) and Others, and Commissioner of Income Tax, Delhi (Central) Vs. Singh Engineering Works P. Ltd., . It was pointed

out to the Tribunal that the Supreme Court had held that penalty under the new Act could be levied as authorised by Section 297(2)(g) if the

assessment was completed, as here, after April 1, 1962, and that there was a patent error in the order of the Tribunal as it ran contrary to this view

of the Supreme Court.

6. When the application came up for hearing, the Tribunal passed another order after hearing the parties and that was on December 28, 1971. The

Bench which heard the appeal originally and which passed the order dated January 5, 1968, was apparently not available in Madras, and

therefore, the miscellaneous application filed by the ITO came before another Bench which passed the order dated December 28, 1971. In that

order, it was held that the decision of the Tribunal suffered from a mistake apparent from the record which was liable to be rectified u/s 254(2).

The application filed by the ITO was, therefore, allowed. In doing so, the Tribunal stated as follows :

The last sentence of paragraph 4 and entire paragraph 5 of the order of the Tribunal dated January 5, 1968, should be deleted and the following

should be substituted in its place :

4. In view of the decision of the Supreme Court in Jain Bros. and Others Vs. The Union of India (UOI) and Others, and Commissioner of Income

Tax, Delhi (Central) Vs. Singh Engineering Works P. Ltd., , the contention of the assessee is rejected. The penalty levied is restricted to 30% of

the tax sought to be evaded.

5. In the result the appeal is allowed in part to the extent referred to above. Excess penalty recovered is ordered to be refunded.

7. The tax sought to be evaded was Rs. 4,881 and 30% thereof would amount to

Rs. 1,464 (approximately). This amount of penalty was retained by the Tribunal. The Tribunal, it may be seen, has not given any reason why it thought fit to reduce the penalty. The legality of the reduction by the Tribunal is now in issue.

8. It is well settled that the Tribunal has no power of review. Section 254 confers a power on the Tribunal to rectify any mistake apparent from the record and to amend any order passed by it under Sub-section (1) of Section 254. The mistake apparent from the record in the present case was as regards the validity of the levy of penalty under the Act of 1961, when the assessment was completed under the Act of 1922. The Supreme Court had held, having regard to the date of completion of the assessment, that penalty could be levied under the Act of 1961. The result was that the earlier order of the Tribunal had to be cancelled or, in other words, the appeal had to be dismissed. If the Tribunal had merely left the order as cancelled, then the rectification would only lead to the position of the appeal having to be dismissed. The Tribunal has, apparently, gone into the question of the leviability of penalty and has agreed that penalty was leviable. It is only on the basis that penalty was leviable that there has been a reduction in the levy of penalty in the manner indicated earlier.

9. The Tribunal's power u/s 254(2) is only to amend the earlier order with a view to rectify any error apparent from the record. Even Section 254(2) does not confer on the Tribunal the power to review its own order. That the Tribunal has actually reviewed its own order is clear from the passage in the statement of the case. However, the Tribunal, while passing the original order dated January 5, 1968, failed, to consider whether the penalty levied was arbitrary and excessive, as mentioned in para. 6 of the grounds of appeal. A power to rectify a mistake does not include a power to review. As the Tribunal has no power of review and as the power of review can only be granted by the statute, which has not been done in the present case, the order of the Tribunal, in so far as it went into the question of quantum of penalty is plainly without jurisdiction. In exercise of the power u/s 254(2), the Tribunal could only have rectified that particular error which was pointed out by the ITO, namely, about the legality of the earlier order in so far as it was held that the penalty could not be levied under the provisions of the new Act.

10. The result of the miscellaneous application filed by the ITO being accepted by the Tribunal would only have rendered the appeal against the order of the AAC being dismissed without any further aspect having to be gone into by way of reviewing its earlier order. The order dated December 28, 1971, in so far as it dealt with the quantum was without jurisdiction. The Tribunal can only rectify the mistake. Interference with quantum cannot be effected in exercise of the power of rectification. It would amount to a -reconsideration of the appeal, for doing which the Tribunal has no power or authority. Whether Rs. 3,000 was leviable as penalty or not is not a mistake apparent from the record.

11. The result is that the two questions are answered in the negative and in favour of the revenue. There will be no order as to costs.