

(1979) 08 P&H CK 0028

In the Punjab And Haryana At Chandigarh

Case No : Income-tax Reference No. 72 of 1974

Commissioner of Income Tax

APPELLANT

Vs

Raman Industries

RESPONDENT

Date of Decision : 27-08-1979

Acts Referred:

Income Tax Act, 1961 — Section 271(1), 274, 274(2)

Citation : (1980) 14 CTR 138 : (1980) 1 ILR (P&H) 540 : (1980) 121 ITR 405

Hon'ble Judges : Rajendra Nath Mittal, J; J.V. Gupta, J

Bench : Division Bench

Advocate : D.N. Awasthy and B.K. Jhingan, for the Appellant; B.S. Gupta and Naginder Singh, for the Respondent

Judgement

R.N. Mittal, J.—The Income Tax Appellate Tribunal, Chandigarh Bench, at the request of the Commissioner of Income Tax, Patiala, referred the following question of law for decision of this court u/s 256(1) of the I.T. Act, 1961 (hereinafter referred to as "the Act"):

"Whether, on the facts and circumstances of the case, the Tribunal was right in law in holding that the Inspecting Assistant Commissioner of Income Tax was not legally competent to pass the penalty order ?"

2. Briefly the facts which have given rise to this reference are as follows :

3. The assessee is a registered firm and manufactures and sells tool bits. For the accounting year ending March 31, 1965, relevant to the assessment year 1965-66, the assessee filed a return of income on September 30, 1965, wherein it showed its income as Rs. 10,365. While making the assessment the ITO noticed that the assessee had purchased goods worth Rs. 96,648 for which bills were not produced by it. He also categorised 26 separate cash credits, the peak of which on February 8, 1965, came to Rs. 60,882. The assessee, when asked to explain the source of the credits, did not furnish any explanation, but said that the amount of Rs. 60,882 be included in the assessment subject to an

adjustment of Rs. 31,000 which had been taxed in the earlier year. The ITO allowed the deduction of Rs. 31,000 as claimed and assessed tax at Rs. 29,882 as income from undisclosed sources. The assessee also agreed to pay tax on business income of Rs. 30,118 as against the income of Rs. 10,365 as declared by it earlier. Thus, the assessment was completed on February 26, 1970, at a total sum of Rs. 60,000. The assessee did not file any appeal against the assessment order.

4. The ITO initiated penalty proceedings u/s 271(1)(c) of the Act before completing the assessment and, as the minimum penalty imposable exceeded Rs. 1,000, the matter was referred to the IAC. He, vide order dated March 29, 1972, passed u/s 274(2) read with Section 271(1)(c) of the Act, levied a penalty of Rs. 4,239. The assessee went up in appeal against the order of the IAC to the Tribunal. The Tribunal held that the onus to prove the genuineness of the cash credits lay upon the assessee and it had not been discharged. Consequently, the penalty u/s 271(1)(c) was exigible. The assessee had pleaded that the penalty proceedings should have been finalised on or before March 25, 1972, but as the same had been finalised on March 29, 1972, the penalty order was barred by limitation. The Tribunal did not accept the contention of the assessee and came to the conclusion that u/s 275 of the Act as amended with effect from April 1, 1971, the IAC could legally pass an order on March 29, 1972. It was also argued on behalf of the assessee that on account of the amendment of Sections 274(2) and 275 by the Taxation Laws (Amendment) Act, 1970, which came into force from April 1, 1971, the IAC could assume jurisdiction if the minimum penalty imposable exceeded Rs. 25,000. In the case in hand the minimum penalty was Rs. 4,239 and, therefore, the IAC had no jurisdiction to levy the penalty. The Tribunal accepted the contention and cancelled the penalty. At the request of the CIT, the above-said question has been referred for the opinion of this court.

5. The learned counsel for the revenue has contended that at the time of institution of the penalty proceedings, the IAC had the jurisdiction to impose penalty. Later, by virtue of the Taxation Laws (Amendment) Act, 1970 (Act 42 of 1970) (hereinafter referred to as the "Amendment Act"), which came into force on April 1, 1971, the jurisdiction to levy penalty was conferred on the ITO. He submits that if the IAC had the jurisdiction to impose penalty when the proceedings were initiated, subsequent amendment in the Act would not divest him of that jurisdiction. Mr. Awasthy argues that once a person institutes a case in a Tribunal, he has a vested right to continue the proceedings in the same Tribunal, notwithstanding that later, on account of amendment of the statute, the Tribunal had been deprived of its jurisdiction. He further argues that there is only one exception to the above principle. It is that if there is an express provision in the statute which gives a retrospective effect to the amendment, the Tribunal is deprived of its jurisdiction. According to him, the IAC, therefore, had the jurisdiction to impose penalty even after the Amendment Act came into force. On the other hand, Mr. Gupta, learned counsel for the assessee, has vehemently argued that the jurisdiction of the Tribunal is a matter relating to procedure. He

further submits that it is well settled that the procedural laws have retrospective effect and, therefore, the Amendment Act would have a retrospective effect. According to him, the IAC, after enforcement of the Amendment Act, was deprived of the jurisdiction to decide the question of penalty against the assessee. He submits that, therefore, the penalty imposed by the IAC was illegal.

6. We have heard the learned counsel for the parties at a considerable length and find force in the contention of Mr. Awasthy. Before dealing with the matter, it is necessary to notice the relevant sections. Section 271 deals with the powers of the ITO and the AAC to impose penalties and Section 274 with the procedure. The aforesaid sections, before the Amendment Act, read as follows :

"271. (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--...

(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,--...

(iii) in the cases referred to in Clause (c), in addition to any tax payable by him, a sum which shall not be less than, but which shall not exceed twice, the amount of the income in respect of which the particulars have been concealed or inaccurate particulars have been furnished....."

"274. (2) Notwithstanding anything contained in Clause (iii) of Sub-section (1) of Section 271, if in a case falling under Clause (c) of that sub-section, the minimum penalty imposable exceeds a sum of rupees one thousand, the Income Tax Officer shall refer the case to the Inspecting Assistant Commissioner who shall, for the purpose, have all the powers conferred under this Chapter for the imposition of penalty..."

7. No amendment was made by the Amendment Act in the aforesaid provisions of Section 271. The amendment was, however, made in Section 274(2). After the amendment, the said sub-section reads as follows:

"(2) Notwithstanding anything contained in Clause (iii) of Sub-section (1) of Section 271, if in a case falling under Clause (c) of that sub-section, the amount of income (as determined by the Income Tax Officer on assessment) in respect of which the particulars have been concealed or inaccurate particulars have been furnished exceeds a sum of twenty-five thousand rupees, the Income Tax Officer shall refer the case to the Inspecting Assistant Commissioner, who shall, for the purpose, have all the powers conferred under this Chapter for the imposition of penalty."

8. From a perusal of the sections it is evident that, before amendment, the ITO could deal with penalty proceedings in case the penalty imposable was more than Rs. 1,000. If the penalty exigible was more than Rs. 1,000, then he had to refer the case to the IAC, who had the jurisdiction to deal with the matter. After

amendment of Sub-section (2) of Section 274, if the minimum penalty that could be imposed was more than Rs. 25,000 then the ITO was required to refer the matter to the IAC but if the penalty was less than Rs. 25,000, he could himself impose it. In the present case, it may be highlighted that the penalty imposed is Rs. 4,239. Therefore, there is no dispute that, before the Amendment, it was the IAC who could impose a penalty on the assessee and after the Amendment Act it was the ITO who could do so. The main question involved in the case is as to whether the amendment of Sub-section (2) of Section 274 is prospective or retrospective.

9. It is a well-settled principle of law that no statute shall have retrospective effect unless its language requires such construction. If a statute has retrospective effect, it is not to be construed so as to have a greater retrospective operation. A statute which affects vested rights must be presumed to be prospective. The legislature may, however, make its operation retrospective so as to take away vested rights. There is an exception to the above principle and it is regarding a statute dealing with the procedure. Such statute has a retrospective effect but if its provisions affect the vested rights, it is prospective and not retrospective. In this regard, it will be advantageous to refer to the following observations of Lord Blackburn in *Gardner v. Lucas* [1877] 3 A C 582 :

"Now the general rule, not merely of England and Scotland, but, I believe, of every civilised nation, is expressed in the maxim, "*Nova constitutio futuris formam imponere debet non praeteritis*"--prima facie, any new law that is made affects future transactions, not past ones. Nevertheless, it quite clear that the subject-matter of an Act might be such that, though there were not any express words to shew it, it might be retrospective. For instance, I think it is perfectly settled that if the legislature intended to frame a new procedure, that instead of proceeding in this form or that, you should proceed in another and a different way; clearly there bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be. Then, again, I think that where alterations are made in matters of evidence, certainly upon the reason of the thing, and I think upon the authorities also, those are retrospective, whether civil or criminal.

But where the effect would be to alter a transaction already entered into, where it would be to make that valid which was previously invalid--to make an instrument which had no effect at all, and from which the party was at liberty to depart as long as he pleased, binding--I think the prima facie construction of the Act is that it is not to be retrospective, and it would require strong reasons to shew that is not the case." (Emphasis * supplied).

10. In order to see whether the amendment of Sub-section (2) of Section 274 was effected retrospectively or not, it is necessary to determine as to whether it takes away a vested right of the assessee. It cannot be disputed that the right to institute proceedings is a procedural matter. It is also well settled that if a statute

takes away the jurisdiction of a Tribunal regarding initiation of the proceedings or appeal, it takes away the vested right. It becomes vested at the time when the proceedings are instituted in a Tribunal. A litigant cannot be deprived of that right. I am fortified in the abovesaid observation by a dictum of the Privy Council in *Colonial Sugar Refining Company Ltd. v. Irving* [1905] AC 369 ;

"To deprive a suitor in a pending action of an appeal to a superior Tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new Tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested." (Emphasis* supplied).

11. The above observations are fully applicable to the present case. This matter also came up before the Federal Court in two cases, namely, AIR 1941 16 (Federal Court) and AIR 1943 24 (Federal Court) . The relevant observations of Sulaiman J., speaking for the Bench in *Mt. Atiqah Begum's* case, are as follows 192 IC 138 :

"It is a well recognized rule that statutes should, as far as possible be so interpreted, as not to affect vested rights adversely, particularly when they are being litigated. When a statute deprives a person of his right to sue or affects the power or jurisdiction of a court in enforcing the law as it stands, its retrospective character must be clearly expressed." (Emphasis * supplied).

12. Varadachariar J., while speaking for the court in AIR 1943 24 (Federal Court) , held that a right to continue a duly instituted suit is in the nature of a vested right and it cannot be taken away except by a clear indication of intention to that effect. A similar matter came up before the Bombay High Court in *C.P. Bannerjee v. B.S. Irani* AIR 1949 Bom 182. In that case, the plaintiff filed a suit for recovery of a sum of Rs. 1,000 on September 12, 1947, on the original side of the High Court. Subsequently, the Bombay legislature enacted several enactments which were contemplated to deprive the High Court of jurisdiction to try suits cognizable by the Small Cause Court as well as the Bombay City Civil Court which was then about to be established. The legislature intended to deprive the High Court of this jurisdiction to receive, try and determine suits between Rs. 1,000 and Rs. 2,000 which could be instituted by the plaintiff at his election in the High Court acting under the provisions of Section 21, Presidency Small Cause Courts Act. The legislature also intended to deprive the High Court of the jurisdiction to receive, try and determine suits not exceeding Rs. 10,000 in value and arising in Greater Bombay which were intended by it to be cognizable by the Bombay City Civil Court which was about to be established. No provision was, however, made by the legislature for transfer of suits pending in the High Court to Small Cause Courts. It was held by N.H. Bhagwati J. that the absence of such provisions had the result of continuing the jurisdiction of the High Court in the matter of determination and trial of suit which had been rightly received by

it. Following observations of the learned judge may be reproduced in extenso (p. 186):

"Normally it would not have a retrospective operation. It has been laid down as a fundamental rule of the English law, which we have been following here, that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary and distinct implication.....There is no doubt that so far as the statutes are concerned, a distinction is broadly made between procedural statutes and statutes which affect the substantive rights of the parties. There is no vested right which a subject has in regard to procedure. But with regard to the jurisdiction of the court in which he has a right to institute proceedings a subject can have a vested right. That this is so is amply borne out by authorities and I shall only content myself with quoting one of them, which is an authority of the Federal Court, a judgment of Varadachariar J. reported in AIR 1943 24 (Federal Court) and the passage at page 27, col. 1, thereof:

"It will be noticed that in that case the Judiciary Act was passed during the pendency of the action in the court of first instance and their Lordships" decision recognised that, from the date of the initiation of the action, the suitor had a right of appeal to a superior tribunal according to the state of the law as it stood at the time of the commencement of the proceeding. This necessarily involves the recognition of an equally valuable right that proceedings should in due course be tried and disposed of by the tribunal before which it had been commenced. This principle that a statute should not be so interpreted as to take away an action which has been well commenced has been affirmed in various cases in differing circum-cumstances. In *Marsh v. Higgins* [1850] 9 CP 551; 19 LJCP 297 it was observed by Wilde C.J., that it must have been well known to both branches of the legislature that strong and distinct words would be necessary to defeat a vested right to continue an action which has been well commenced". (Emphasis* supplied).

13. A Division Bench of the Madras High Court in *Ganapathy Raja Valia Raja of Edapally, Sivaroopam Vs. The Commr. for Hindu Religious and Charitable Endowments, Madras and Others*, , observed that a party has a vested right to have a suit tried in a forum in which it was commenced. Such a right is a substantive one and is not in the realm of procedural law. There is no difference in principle between the case of an appeal and that of a suit. It is further observed that a statute should not, therefore, be so construed as to take away an action which has been well commenced.

14. Sections 271 and 274 as amended by the Amendment Act came up for interpretation before the Gujarat High Court in *Commissioner of Income Tax, Gujarat Vs. R. Ochhavlal and Co.*, and *Commissioner of Income Tax Vs. Royal Motor Car Co.*, and before the Andhra Pradesh High Court in *Addl. Commissioner of Income Tax Vs. Dr. Khaja Khutabuddinkhan*, , wherein a similar interpretation was taken. In *Commissioner of Income Tax, Gujarat Vs. R. Ochhavlal and Co.*, .it

was held that the jurisdiction of the IAC to deal with penalty matter is to be looked at as on the date of initiation of proceedings and not with reference to the subsequent events and such jurisdiction cannot be divested by what subsequently happened. This view was again taken by the same High Court in Commissioner of Income Tax Vs. Royal Motor Car Co, . In Addl. Commissioner of Income Tax Vs. Dr. Khaja Khutabuddinkhan, a Division Bench of the Andhra Pradesh High Court said that if during the time when the matter of penalty had been referred to and was pending before the IAC, the law was changed and the minimum penalty for purpose of making a reference to the IAC was raised from Rs. 1,000 to Rs. 25,000, it does not mean that the jurisdiction of the IAC to impose penalty was taken away. We are in respectful agreement with the abovesaid observations.

15. From the above observation it emerges that a statute dealing with procedure is always retrospective and its provisions also apply to the proceedings pending at the time of its enactment but where some provisions of a statute of procedure affect vested rights, these are prospective in operation unless there is an indication in the statute to the contrary. The jurisdiction of a Tribunal to try a case is a vested right and is to be determined according to the law in force at its institution. A change in law pending the case cannot affect the right of the parties to continue proceedings in that Tribunal in the absence of provisions to the contrary. There is no provision in the Amendment Act which shows that the amendment in Section 274 of the Act is retrospective. The section deals with vested right and, therefore, it is prospective. Consequently, the IAC had the jurisdiction to impose the penalty.

16. The learned counsel for the assessee has referred to the decisions of the Orissa and Allahabad High Courts in RADHESHYAM AGARWALLA Vs. COMMISSIONER OF Income Tax, ORISSA, AND OTHERS., and Commissioner of Income Tax Vs. Pearey Lal Radhey Raman, wherein a contrary view has been taken. With great respect to the learned judges, we are not inclined to accept their view.

17. For the aforesaid reasons, we answer the question in the negative, i.e., in favour of the revenue. No order as to costs.

J.V. Gupta, J.

18. I agree.