
(1980) 02 AP CK 0013

In the Andhra Pradesh High Court

Case No : Case Referred No. 207 of 1976

Commissioner of Income Tax

APPELLANT

Vs

Rameswar and Co.

RESPONDENT

Date of Decision : 11-02-1980

Acts Referred:

Income Tax Act, 1961 — Section 256(1), 271(1)(c), 271(1)(iii)

Citation : (1980) 4 TAXMAN 112

Hon'ble Judges : C. Kondaiah, C.J.;Raghuvir, J

Bench : Division Bench

Advocate : P. Rama Rao, for the Appellant; Y.V. Anjaneyulu, for the Respondent

Judgement

Raghuvir, J.—This reference is made by the income tax Appellate Tribunal, Bench A, at Hyderabad u/s 256(1) of the income tax Act, (43 of 1961)("the Act"), at the instance of the Commissioner of income tax, Hyderabad, for the opinion of this court on the following question of law:

Whether, on the facts and in the circumstances of the case, when the assessee concealed particulars of income in the original return filed on October 7, 1965 (September 30, 1965) and also in the revised returns filed on January 2, 1970, and January 7, 1970 (i.e., after April 1, 1968), the quantum of penalty to be levied should be as per the amended provisions of section 271(1)(iii) brought into effect from April 1, 1968?

M/s. Rameswar & Co., Zaheerabad, is a registered firm, the assessee, constituted with fifteen partners. The assessee carried on the business of excise contracts and for the assessment year 1965-66, the accounting year of the firm ended on September 30, 1964. Two returns on September 30, 1965, were lodged for assessment year 1965-66, because of change in the constitution of the firm in that accounting year. One return related to the period for October 1, 1963, to July 9, 1964, showing. an income of Rs. 3,96,083, the other return related to the period from July 10, 1964, to September 30, 1964, showing the income to be Rs.

1,72,868. The firm again on January 2, 1970, revised the returns and lodged for the first period showing the income as Rs. 3,97,981, and on January 7, 1970, in another revised return for the second period the income was shown as Rs. 5,70,849. The ITO in the course of assessment proceedings detected a deficit of cash balance of Rs. 19,087. The assessee, thereupon, promptly lodged another, the fifth return, on January 31, 1970, including the sum of Rs. 19,087 and showed the income of the firm to be Rs. 5,89,936. The assessments were completed on March 30, 1970, holding the income to be Rs. 6,82,028. The AAC, on appeal, held the income to be Rs. 5,92,030.

2. The above calendar of events shows that the assessee had lodged five returns and except in the last return lodged on January 31, 1970, in all the preceding four returns, the particulars showed that the income was less by Rs. 19,087. The ITO, therefore, initiated penalty proceedings against the assessee for concealment of income in the original returns of September 30, 1965, as well as of January 2 and 7, 1970, in the revised returns. On transmission of the proceedings before the IAC, the assessee sought to explain away the (offence) concealment that the assessee had not concealed the income for it was contended that even before the assessment was completed on March 30, 1970, a return with correct particulars was lodged by the firm on January 31, 1970. This contention was tenuous and was in the orders stated and rejected. The assessee was found to have " concealed " the income in its four returns and was held guilty of the offence. The firm was ordered to pay Rs. 20,000. The amount of penalty thus ordered was a little more than the minimum of the penalty u/s 271(1)(c) of the Act as amended by the Finance Act of 1968.

3. The appellate authority and also the Appellate Tribunal affirmed the order of the ITO on aspects touching the concealment but as to the provision under which the penalty to be imposed, the two authorities construed the facts to hold that when original returns were lodged on September 30, 1965, there was a " concealment " and when revised returns were lodged on September 30, 1965, there was also a " concealment " but the revised returns showed when lodged on January 2nd and 7th of 1970 to contain particulars shown in the two returns " identical " as in the preceding returns and on the facts there was not " another concealment ", for, all the four returns were based on the self-same facts. On that premise, a minimum of penalty applying the provision of section 271(1)(c) as existed prior to the amendment of the Finance Act of 1968 was ordered to be computed.

4. The question on the facts of the instant case, whether on the day when the original returns were filed by the assessee and again on the day when the revised returns were filed, " two offences " were committed by the assessee, does not arise in the instant case, for, the decision of the Tribunal on the facts of the case is that there was one offence and the assessee is penalised only once for concealment. For the purpose of this case, the inference is accepted as a question of fact, as, otherwise, what should follow on such facts, we are not

called upon to decide on the question. In *N.A. Malbari and Bros. Vs. Commissioner of Income Tax, Bombay*, was a case where, on the facts of the case, the High Court and the Supreme Court both held that there was one offence and in that context made a "friendly reference" in that case (p. 298):

It may be that in respect of the same concealment two orders of penalty would not stand but it is not a question of jurisdiction.

5. To sum up this part of the case, on the facts in the instant case, the original and in the revised returns the facts shown were held to be "identical". The assessee was guilty on a single count and the offence in that sense was committed on September 30, 1965.

6. This court on August 25, 1976, pointed out as to when the offence of concealment had occurred in its opinion in a reference reported in *Addl. Commissioner of Income Tax Vs. Dr. Khaja Khutabuddin Khan*, to which one of us (Raghuvir J.) was a party and in that case as the offence occurred from the standpoint of occurrence the law obtained on the date of occurrence was held to govern the imposition of penalty. The other High Courts had taken similar view but it is not necessary to refer to all of them, for, in a recent case in *Brij Mohan Vs. Commissioner of Income Tax, New Delhi*, the Supreme Court took an identical view of the question as evident from the following passage (p. 4):

In the case of a penalty, however, we must remember that a penalty is imposed on account of the commission of a wrongful act, and plainly it is the law operating on the date on which the wrongful act is committed which determines the penalty. Where penalty is imposed for concealment of particulars of income, it is the law ruling on the date when the act of concealment takes place which is relevant.

7. A like principle was held to govern penalty under the G.T. Act, 18 of 1958, in *Commissioner of Gift-tax Vs. C. Muthukumaraswamy Mudaliar*; in *COMMISSIONER OF WEALTH-TAX, MADRAS Vs. P. C. M. SUNDARAPANDIAN AND OTHERS.*, and *Commissioner of Wealth-tax Vs. M.V. Rajamma*, cases under the Wealth-tax Act, 26 of 1957, and in those cases, a similar principle was held to govern offences under that Act.

8. In this case, before the question referred is answered, it is required to consider the incidents of penalty and some of its attributes vested in the authorities to impose penalty. The power to levy penalty per se is in the nature of a quasi-criminal proceeding. The courts and tribunals do not impose penalties because they are authorised to impose. The courts and tribunals need not impose penalties unless a deterrent punishment on facts is warranted and even when imposition is justified, the courts and tribunals, which include the authorities under Act 43 of 1961, have ample discretion to consider the circumstances before a penalty is levied, for, such are the incidents of penalty proceedings. In *Hindustan Steel Ltd. Vs. State of Orissa*, a case under the Orissa Sales Tax Act, 14 of 1947, the Supreme Court observed (p. 29):

An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged, either acted deliberately in defiance of law or was guilty of conduct, contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute.

9. The firm in the instant case as of fact was found guilty of concealment for furnishing incorrect particulars on September 30, 1965. The "offence " (an expression which is now commonly used and has gained currency) was committed by the assessee on September 30, 1965. Therefore, the unamended provisions of section 271(1)(c) have application. The Appellate Tribunal, in our view, had properly directed (the ITO) to compute the penalty under the unamended provision. We answer the above question in the negative and in favour of the assessee and against the revenue. In the circumstances of the case, we make no order as to costs.