

(1980) 12 CAL CK 0006
In the Calcutta High Court
Case No : IT Reference No. 8 of 1979

Commissioner of Income Tax

APPELLANT

Vs

Ramnagar Cane and Sugar Co. Ltd.

RESPONDENT

Date of Decision : 23-12-1980

Acts Referred:

Evidence Act, 1872 — Section 106

Income Tax Act, 1961 — Section 139, 144, 210, 211(3), 212

Citation : (1981) 6 TAXMAN 379

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

Bench : Division Bench

Advocate : D. Pal, P. K. Pal, Miss M. Seal and N. Moitra, for the Appellant; Balai Pal and S.C. Chakrabarty, for the Respondent

Judgement

Sudhindra Mohan Guha, J.—This reference relates to the assessment year 1971-72 and the relevant previous year ended on 31st August, 1970. The assessee was a limited company having a business of manufacture and sale of sugar. In respect of the financial year 1970-71, the ITO raised the advance tax demand of Rs. 2,99,626 based on a total income of Rs. 5,44,744 u/s 210 of the Act and the demand notice was served on the assessee on 27th May, 1970. The said demand became payable in three instalments, on 15th June, 1970, 15th September, 1970, and 15th December, 1970, and the assessee paid it actually on 15th June, 1970, 12th September, 1970, and 15th January, 1971. On 7th May, 1971, the books of account of the assessee-company were audited. On 1st April, 1972, the assessee-company filed its return of income for this assessment year on a total income of Rs. 17,78,459. The ITO completed the assessment u/s 144 of the Act on 28th February, 1974, on a total income of Rs. 26.50 lakhs which the AAC confirmed in appeal. The Tribunal, however, reduced the income to Rs. 24 lakhs subject to depreciation of the AAC's decision on the assessee's claim for sugarcane from loss of Rs. 5.46 lakhs (sic). On these facts, the ITO took a view that the assessee-company had failed to comply with the provisions of section 212(3A) of the Act and for this default he initiated penalty proceedings u/

s 273 of the Act by his show cause notice dated 26th February, 1974. This proceeding culminated in the levy of the impugned penalty which had been confirmed in appeal by the AAC.

2. There was a further appeal to the Tribunal by the assessee. It was argued that a quasi-criminal proceeding like penalty had been dealt with by the ITO and the AAC in a light-hearted manner. It was further argued that no attempt at all had been made to establish mens rea on the part of the assessee. With reference to the AAC's observation that the assessee was a recalcitrant assessee it was argued that such observation was baseless and that the AAC in making such observation had ignored the facts which were placed before him that the assessee-company had been subjected to calamities and disasters due to political unrest and that with the department's own acquiescence it was paying its outstanding tax by instalments. With regard to the business trend, reflected in the increase of turnover from Rs. 1.34 crores to Rs. 1.57 crores, learned representative for the assessee said that the profit on the increased turnover and the stocks at the rate at which profit had been earned for the immediately preceding year, that is, 2 per cent was about Rs. 5.75 lakhs and the assessee-company having also paid advance tax u/s 210 of the Act on an income of Rs. 5.44 lakhs, it felt that no further action was called for. He further said that a huge profit had arisen from the valuation of closing stock which the assessee-company had not anticipated and that its audited books of account became available, as stated by the AAC himself only on 7th May, 1971, and hence it should have been held that the assessee was prevented by reasonable cause from filing the estimate u/s 212(3A) of the Act. The conclusion of the AAC was also challenged on the ground that there was no conscious disregard of the statutory obligation on the part of the assessee. Proceeding further, the learned advocate said that the penalty proceeding u/s 273(c) of the Act was a quasi-criminal proceeding and establishment of mens rea on the part of the department was an essential ingredient of this penalty proceeding. For this proposition, he relied upon certain decisions of the Punjab & Haryana High Court and the Madras High Court. Reference was also made to the decision in the case of Hindustan Steel Ltd. Vs. State of Orissa, as also in the case of Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, and thus it was concluded that the penalty u/s 273(c) could be levied by the department only after establishing that there was an intentional and deliberate default on the part of the assessee to comply with the provisions of section 212(3A) of the Act.

3. On the contrary, it was submitted on behalf of the department that the assessee was liable to make an estimate u/s 212(3A) of the Act and that the assessee-company had failed to do so. The assessee did not avail of the opportunity given by the ITO to explain the circumstances leading to this failure. Moreover, it did not even care to comply with ITO's notices issued for this purpose. It was further stated that the circumstances under which the failure had occurred were within the knowledge of the assessee, and, in law, therefore, it was for the assessee to state the relevant facts before the ITO so that he could

consider whether a reasonable cause existed which prevented the assessee from filing the requisite estimate. But the assessee-company did not do so. It was also pointed out that even though the audited accounts became available on 7th May, 1971 the assessee-company delayed the filing of the return of income till 1st April, 1972. He also pointed out that the previous year of the assessee company having ended on 31st August, 1970, that is, more than three months prior to the last date for the filing of the estimate u/s 212(3A) of the Act, it was not only that the assessee could foresee that it was liable to make an estimate u/s 212(3A) of the Act but that it knew for certain, having in its possession the trading results of the entire year, that it was under an obligation to pay the advance tax in accordance with section 212(3A) of the Act and yet it did not do so and did not also explain to the ITO the reasons for the failure. In these circumstances, it was stated that it could not in any way be said that the assessee was prevented by any reasonable cause from filing the estimate in terms of section 212(3A) of the Act. This was characterised as a clear case of intentional and wilful default.

4. As to the question of burden of proof, learned departmental representative urged that the case relied upon by the learned advocate for the assessee had no application at all and that mens rea was not required to be established by the ITO while levying penalty u/s 273 (c) of the Act and relying upon the decisions of the Kerala and the Orissa High Courts, he submitted that what was required to be done was that on the material placed before the ITO by the assessee, the former was to satisfy himself that the assessee was not prevented by reasonable cause from complying with the provisions of section 212(3A) of the Act. He thus concluded that on facts and also in law the assessee was liable to pay penalty u/s 273(c) of the Act.

5. On a consideration of the arguments advanced by both the parties, the Tribunal observed that the assessee was liable to make an estimate u/s 212(3A) and to pay the advance tax on that basis. Not only that, the assessee, according to the Tribunal, was well aware by 31st December, 1970, that the turnover of that year had exceeded the last year's turnover by Rs. 23 lakhs or so, that, similarly, the purchases of sugarcane had exceeded by Rs. 42 lakhs and during the year it had crushed 1,58,269 tons of sugarcane against 77,722 tons last year and that its closing stock was more than the last year's closing stock by Rs. 80 lakhs. It was also observed that it had a period of over three months after 31st August, 1970, to take stock of this known fact to file its estimate u/s 212(3A), but it did not do so. In the cases covered by section 212(3A) the assessee was required to make an estimate of their current income but for obvious reasons such estimate was to be made before the close of the previous year. But in the present case the assessee-company was in a far better position as its previous year had ended and it had become aware of the results of the transactions of the entire year long before the last date for filing of the estimate u/s 212(3A) and yet it did not file the estimate, even though, in fact, it should have known that the liability had actually arisen. As to the question of onus, the Tribunal, after having gone through section 273(c) and the decisions referred to by both sides,

observed that the provision of section 273(a) and section 273(b) differ materially. Whereas the former provides that the ITO is to be satisfied that an assessee "has furnished u/s 212 an estimate of advance tax payable by him which he knew or had reason to believe to be untrue", the latter merely requires that the ITO should be satisfied that the assessee has without reasonable cause, failed to furnish an estimate of the advance tax payable by him in accordance with the provisions of section 212(3A). Section 273(a) refers clearly to the filing of an untrue estimate of advance tax u/s 212 with full knowledge and intention and it, therefore, involves mens rea in the same way as u/s 271(1)(c) if an assessee furnishes inaccurate particulars of income with the full knowledge and intention, but the same cannot be said about section 273(c). The provisions of section 273(c) are, in the opinion of the Tribunal, in pari materia with section 271(1)(a), as, in both, the reference is to the occurrence of a default without a reasonable cause. In the former, such default is the failure to file an estimate of the advance tax payable u/s 212(3A) and in the latter the failure is to file the return of income in terms of section 139. The Tribunal, thereafter, following the view taken by the Kerala and Orissa High Courts proceeded on the basis that penalty u/s 273(c) did not require the establishment of mens rea, i.e., conscious disregard of the provisions of law, and that, for levying such penalty, the ITO had only to satisfy himself that there was no reasonable cause preventing the assessee from filing the estimate of advance tax in terms of section 212(3A). According to the Tribunal, the assessee neither placed any material before the ITO nor the record contained any evidence to show that the assessee-company's failure to file the estimate of advance tax u/s 212(3A) was for a reasonable cause. It was also observed that long before the last date for the filing of such estimate the assessee-company had become aware of the fact that in the relevant previous year it had earned substantial profit which was 300% of the total income on the basis of which an advance tax u/s 210 had been demanded. In short, it was found that the assessee had been guilty of contumacious conduct and also of conscious disregard of the statutory obligation. The order passed by the AAC imposing the impugned penalty was confirmed.

6. Having been dissatisfied with the order of the Tribunal, the assessee-company tendered (an application to) the Tribunal to raise and refer as many as six questions fully stated in the statement of the case. Considering the questions the Tribunal was of the view that those questions would be conveniently condensed into one, viz.:

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in sustaining the order of penalty u/s 273(c) of the income tax Act, 1961?"

7. The aforesaid question was referred to this court for its opinion. Dr Debi Prosad Pal at the outset points out that on the question as framed he could challenge the findings of the Tribunal as perverse. According to him the question as referred to this court was of a comprehensive nature and the questions raised

by the assessee were not rejected, on the contrary all those questions were condensed into one. In support of this argument he makes reference to the decision of the Supreme Court in the case of *The Commissioner of Income Tax, Bihar and Orissa, Patna Vs. S.P. Jain*, . In this case, it was held that though the questions referred to the High Court did not challenge the validity of the findings given by the Tribunal, as the Tribunal had failed to take into account the relevant material on record in arriving at its findings and had further acted on inadmissible evidence and misread the evidence and based its conclusion on conjectures and surmises, the court could ignore the findings of the Tribunal and re-examine the issues arising for a decision on the basis of the material on record. In this case it was also held that the High Court and the Supreme Court have always the jurisdiction to interfere with the findings of the Appellate Tribunal if it appears that either the Tribunal has misunderstood the statutory language, because the proper construction of the statutory language is a matter of law or it has arrived at a finding based on no evidence or where the finding is inconsistent with the evidence or contradictory of it or it has acted on material partly relevant and partly irrelevant or where the Tribunal draws upon its own imagination and imports, facts and circumstances not apparent from the record or bases its conclusion on mere conjectures or surmises or where no person judicially acting and properly instructed as to the relevant law would have come to the determination reached. In all such cases, the findings arrived at are vitiated-(See p. 381 of 87 ITR).

8. Mr. Balai Pal, learned advocate for the revenue, in reply, makes a reference to the decision of the Supreme Court in the case of *Karnani Properties Ltd. Vs. The Commissioner of Income Tax, West Bengal*, . He draws our attention specifically at p. 554 of the report wherein it is stated that when the question referred to the High Court speaks of "on the facts and in the circumstances of the case", it means on the facts and circumstances found by the Tribunal and not about the facts and circumstances that may be found by the High Court. We have earlier referred to the facts found and the circumstances relied on by the Tribunal, the final fact-finding authority. It is for the Tribunal to find the fact and it is for the High Court and the Supreme Court to lay down the law applicable to the facts found. Neither the High Court nor the Supreme Court has jurisdiction to go behind the statement of case made by the Tribunal. The statement of case is binding on the parties and they are not entitled to go behind the fact found by the Tribunal in the statement.

9. In the case in hand Dr. Pal does not challenge the statement of case as not binding on the parties. His only contention is that such finding was perverse in a sense and under the question as framed he was entitled to challenge such a finding. It has already been pointed out that the assesses raised as many as six questions for reference to the High Court. The Tribunal did not reject any of the questions. On the other hand, all those questions were condensed into one. In the opinion of the Tribunal, the question as framed would cover all the points raised by the assessee. In this view of the matter, we do not think it would be

right to shut out the assessee from raising the validity of the finding of the Tribunal on the ground of perversity.

10. As to the general principle for the levy of penalty, Dr. Pal refers to the decisions of the Supreme Court in the case of Hindustan Steel Ltd. Vs. State of Orissa, . In this case it was held by the Supreme Court that an order imposing a 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. The penalty will not also be imposed merely because it is lawful to do so. Whether the 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 a 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.

11. Next he refers to the decision of the Gujarat High Court in the case of Addl. Commissioner of Income Tax, Gujarat Vs. I.M. Patel and Co., . According to the Gujarat High Court, the penalty proceeding is a quasi-criminal proceeding. Whenever a statute defines an offence and provides a punishment for it, it is for the prosecution to prove all the ingredients of the offence. In penalty proceedings u/s 271(1)(a) of the Act, the assessee upon whom the penalty is sought to be imposed is in the position of an accused in a criminal trial and, therefore, all the ingredients of the offence for which the penalty can be imposed must be established by the revenue. It is from this aspect that one has to consider the question whether the words "failure without reasonable cause" in section 271(1)(a) constitutes an ingredient of the offence or not. Looking at the wordings of the section and on a plain reading of section 271(1)(a), it is obvious, first, that the failure to file the return may be with a reasonable cause or without reasonable cause, but the offence for which the penalty is imposable is failure without reasonable cause to file the return within the time specified in the section, and, therefore, it is for the revenue to establish as an ingredient that the failure in the particular case was without reasonable cause. Once the department has discharged that initial burden, it will be for the assessee to show that there was reasonable cause on his part in failing to furnish the return in time. On the principles underlying section 106 of the Evidence Act, since the facts which constitute a reasonable cause are specially within the knowledge of the assessee, it will be for him to establish those facts, but the department must first lead evidence which would go to show, prima facie, that the assessee had no reasonable cause in failing to file the return within the time specified. Mere failure to file the return within the time without anything more will not expose the assessee to penalty. Mere falsity of the explanation on the part of the assessee is not enough to constitute an offence under the section. In view of the

decisions of the Bombay High Court in Commissioner of Income Tax, Ahmedabad Vs. Gokuldas Harivallabhdas, and of the Supreme Court in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, , it is clear that the burden of proving all the ingredients of the offence is upon the department and if the department fails to lead any evidence on the point, besides merely pointing out that there was failure to furnish the returns within time, the department will fail so far as the penalty proceedings u/s 271(1)(a) are concerned. On the basis of this decision, Dr. Pal argues that the provisions of section 271(1)(a) are more or less the same as in section 271(1)(c). In short, he points out that the onus would be on the department to prove that the assessee had without reasonable cause failed to furnish an estimate of the advance tax payable by him in accordance with the provisions of section 212(3A).

12. We think that in the present case the question of onus loses much its importance as both the parties adduced evidence. Both parties having adduced evidence, the onus has, to a certain extent, been divided. Thus entering into the question on whom the initial onus lay, we propose to examine the facts and circumstances of the case to find out whether the assessee was prevented by reasonable cause from complying with the provisions of section 212(3A) of the income tax Act, 1961. With regard to the profit on the increased turnover and the stocks, the assessee-company appears to have paid advance tax u/s 210 of the Act on an income of Rs. 5.44 lakh. Huge profit had arisen from valuation of closing stock which, according to Dr. Pal, could not reasonably be estimated, because the audited books account became available only on 7th May, 1971. He refers to p. 73 of the paper book, which runs as follows :

"Profit on the basis of G.P. Ratio

Rs.

Business profit for 1968-69

2,64,000

Rs.

G. P. Ratio

2,64,000

x

100=

1.99%

1,32,35,000

Say

2%

Rs.

Sale of 1969-70 Sugar

1,56,98,812

do Molasses

1,81,091

1,58,79,903

Rs.

Say

1,58,80,000

2% thereof

3,17,600

Sale of 1969-70

1,58,79,903

Stock as on 31-8-70

1,27,35,912

2,86,15,815

Rs.

Rounded

2,86,16,000

2% thereof

5,72,320

13. With regard to the business trend reflected in the increase of the turnover from Rs. 1.30 crores to Rs. 1.57 crores, he said that the profit on the increased turnover and the stocks at the rate at which profits had been earned in the immediately preceding year, that is, 2%, was about Rs. 5.72 lakhs and the assessee-company having already paid advance tax u/s 210 on an income of Rs. 5.44 lakhs, the assessee felt that no further action was called for. With reference to p. 73 as quoted before, Dr. Pal argued that a huge profit had arisen from the valuation of closing stock of which the assessee-company had no idea and that its audited books of account became available as stated by the AAC himself on 7th May, 1971. In the circumstances, it is argued by him that the AAC should have held that the assessee had been prevented by reasonable cause from filing the estimate u/s 212(3A).

14. Mr. Balai Pal with reference to section 210 and section 211(3) of the Companies Act, 1956, argues that it was for the assessee to submit its annual accounts and balance-sheet at the annual general meeting of the company. For the authentication of the balance-sheet and profit and loss account, he refers to section 215 of the said Act. With reference to the aforesaid provision, it is contended by Mr. Pal that the assessee should have formed certain idea as to the huge profits which it was going to earn at the close of the year. In reply, Dr. Pal refers to p. 297 of the Book-keeping and Accounts by Spicer and Pegler (17th Edn.), wherein it is stated that the amount carried forward for stock and work-in-progress should be computed on a basis which having regard to the nature and circumstances of the business will enable the accounts to show a true and fair view of the trading results and the financial position. In most business the basis should be the cost of the stock held, less any part thereof which properly needs to be written off at the balance-sheet date.

15. It transpired from the statement of the case that the assessee-company paid advance tax u/s 210 of the Act on an income of Rs. 5.44 lakhs. The ITO completed the assessment u/s 144 of the Act on a total income of Rs. 26.50 lakhs which, however, was reduced to Rs. 24 lakhs by the Tribunal. This huge profit, according to the assessee, had arisen from a valuation of the closing stock only and its audited books of account became available only on 7th May, 1971. In the above facts and circumstances, it can be reasonably said that the assessee had no idea as to the actual profits at a time when it had paid the advance tax on the basis of the profit earned in the immediately preceding year. Thus, it could not be said that there was a failure on the assessee's part to file an estimate of such tax in terms of section 212(3A). Moreover, the failure, if any, could not have been said to have occurred without a reasonable cause. In this view of the matter, we are of the opinion that the Tribunal was not justified in sustaining the order of penalty u/s 273(c) of the income tax Act, 1961.

16. The question, accordingly, is answered in the negative and in favour of the assessee.

17. Each party will pay and bear its own costs.

Sabyasachi Mukharji, J.

I agree.