(1988) 04 OHC CK 0026

In the Orissa High Court

Case No : Special Jurisdiction Case No''s. 72, 78 and 79 of 1981

Commissioner of Income Tax APPELLANT

Vs

S. Samantasinghar and Another RESPONDENT

Date of Decision : 04-04-1988

Acts Referred:
Income Tax Act, 1961 — Section 271(1)

Citation : (1988) 173 ITR 425

Hon'ble Judges : H.L. Agrawal, C.J;K.P. Mohapatra, J

Bench : Division Bench

Advocate : Sovesh Roy, for the Appellant; A.K. Ray, for the Respondent

Judgement

H.L. Agrawal, C.J.—All the three cases, which raise a common question of law and, therefore, have been heard together, are being disposed of herewith. The essence of the question is as to what would be the determining factor for applying the law relating to imposition of penalty in case of concealment of income. The petitioners in all the three cases are doctors. In the first case, the year of assessment is 1973-74 and in the other two cases, in which the petitioner is the same, the years of assessment are 1971-72 and 1972-73. The question of law referred by the Tribunal u/s 256(1) of the Income Tax Act, 1961 (for short " the Act "), in all the three cases is as follows :

" Whether, on the facts and in the circumstances of the case, the Tribunal was correct in holding that the penalty at the minimum is leviable with reference to the amended law ? "

2. Facts of S.J.C. No. 72 of 1981 :

The assessee, Dr. S. Samantasinghar, besides his professional income was also deriving salary income from the State Government. He filed a return on November 21, 1973, for the assessment year 1973-74, showing gross receipt of Rs. 49,900 from his profession and claiming Rs. 33,500 as expenditure. A part of the claim was allowed, the details whereof are not necessary for my purpose.

The Income Tax Officer, while making the assessment on December 31, 1975, initiated penalty proceedings u/s 271(1)(c) of the Act. The assessee contested the proceeding, but, ultimately, the Income Tax Officer, by his order dated March 31, 1977, held that there was concealment of income of Rs. 21,200 and imposed penalty accordingly. The appeal before the Appellate Assistant Commissioner by the assessee also failed. Before the Tribunal, the contention that the order of penalty having been passed after the amendment of the Act in 1976, i.e., after April 1, 1976, the computation should have heen made according to the law as existed on the date of the order was accepted as the Tribunal had already taken this view in Dr. S. M. Som''s case (assesssee in the other two cases) and accordingly it directed computation of the minimum penalty in accordance with the amended law in existence on the date of the order, i.e., March 31, 1977.

3. Facts of S.J.C. Nos. 78 and 79 of 1981 :

The assessee in these cases, a medical practitioner, had originally filed a return u/s 139(1) on August 1, 1972, showing a net receipt of Rs. 6,000 as personal income. He, however, filed a revised statement later, showing a gross amount of Rs. 5,000 and a net income of Rs. 2,979. The assessment for 1971-72 was completed on October 29, 1971. On receipt of certain information from a Government Department that the assessee had received a sum of Rs. 30,516 during the financial year 1970-71 by way of consultation fees from the employees of the Central Government, the assessment for the period 1971-72 was reopened u/s 147 read with Section 148 of the Act. On similar information that during the assessment year 1972-73, the assessee had received a sum of Rs. 25,211 from the (Central Government) employees, the Income Tax Officer, while reopening the assessment, also initiated penalty proceedings u/s 271(1)(c) of the Act for both the periods on February 26, 1975. The explanation of the assessee was rejected and for the assessment year 1971-72, the Income Tax Officer found concealment of Rs. 17,660 and for the next year Rs. 17,550. Accordingly, penalties were levied on March 31, 1977. Having failed before the Appellate Assistant Commissioner, the assessee took the matter before the Tribunal. The Tribunal, in view of the amendment brought in the statute book with effect from April 1, 1976, whereby the quantum of penalty was referable only to the tax sought to be evaded and not to the income concealed, reduced the quantum of penalty and on an application by the Revenue, has made the references.

4. A large number of decisions were cited at the bar. But before I come to the decisions, let me first notice the changes made in the law from time to time.

5. Chapter XXI of the Act deals with the " Imposable penalties ". Section 271 of this Chapter deals with various situations under which penalties can be imposed and reads as follows :

" 271(1). If the Income Tax Officer or the Appellate Assistant Commissioner or the Commissioner (Appeals) 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, "

6. There have been legislative changes from time to time regarding the measure of penalty imposable in relation to the cases referred to in Clause (c) which is dealt with in Clause (iii) of Sub-section (1) of Section 271.

7. Clause (iii) dealing with the mode of calculation and imposition of penalty in the cases referred to in Clause (c) originally stood as follows :

" (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 twenty per cent, but which shall not exceed one and a half times the amount of the tax, if any, which would have been avoided if the income as returned by such person had been accepted as the correct income. "

8. This was substituted by the Finance Act, 1968, with effect from April 1, 1968, by the following clause :

"(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. "

9. Clause (iii) and the proviso were again substituted by the Taxation Laws (Amendment) Act, 1975, with effect from April 1, 1976, as follows :

" (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 tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income :

Provided that, if in a case falling under Clause (c), 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 not issue any direction for payment by way of penalty without the previous approval of the Inspecting Assistant Commissioner. "

10. The 1976 amendment thus gave considerable relief to the assessees and it is on this account that the question has assumed importance because it will have a tremendous impact on the quantum of penalty.

11. Whereas the stand of the assessee is that the law should be applied with reference to the date of the making of the order, on behalf of the Revenue, it was submitted that it must be with reference to the date when the act of concealment was committed as the offence of concealment was complete when the wrong

return was filed. In other words, according to the Revenue, it is the date of filing of the return by the assessee concealing his real income which is crucial and the law in force on that day alone should apply to such cases.

12. As already stated, the question is not res Integra and has fallen for consideration times without number before different High Courts. I may refer first to a decision of this court in the case of Commissioner of Income Tax Vs. K.C. Behera and Others, , which was relied upon on behalf of the assessees. In that case, for the accounting year ending on September 17, 1964, the return was filed subsequently. On April 1, 1964, the word " deliberately " in Section 271(1)(c) had been deleted and an Explanation was added. In this background, the question raised on behalf of the assessee was that the Revenue had failed to establish that the assessee had concealed the particulars of his income or deliberately furnished inaccurate particulars of income. This court directed the Tribunal to consider the effect of the amendment of Section 271(1)(c). The form of question falling for consideration in that case was rather different and not as arising here.

13. But a large number of High Courts, namely, the Allahabad High Court in Commissioner of Income Tax Vs. Data Ram Satpal, , Amjad Ali Nazir Ali Vs. Commissioner of Income Tax, and Addl. CIT v. Mewa Lal Sankatha Prasad [1919] 116 ITR 356, the Madhya Pradesh High Court in Commissioner of Income Tax Vs. Ramchand Kundanlal Saraf, , Additional Commissioner of Income Tax Vs. Balwant Singh Sulakhanmal, and Commissioner of Income Tax Vs. Indore Samachar, , the Andhra Pradesh High Court in Addl. Commissioner of Income Tax Vs. Medisetty Ramarao, and the Patna High Court in Commissioner of Income Tax Vs. Lalji Ram Bhagat, , have taken the view that the Jaw applicable to the mode and manner of levy of penalty would be the law which was in force as on the date of commission of the offence or contravention of a particular provision of the statute and not as it stood on the date of detection.

14. The provisions relating to penalty are also of penal character. The penalty is in the nature of a punishment. Therefore, the quantum of penalty must be determined with reference to the law prevailing on the date when the Act of concealment was committed and not when the penalty proceedings were initiated or the order imposing penalty was passed, unlike proceedings for assessment of tax which were governed by the law prevailing during the assessment year.

15. Article 20 of the Constitution also provides that no person will be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. The above authorities are direct in point and the consensus of judicial opinion is against the contention of the assessee. Particularly, there is no divergence of judicial opinion on this point.

16. In view of the direct decisions touching on the main question, it is not necessary to refer to some other decisions dealing with the cases falling under the other clauses of Section 271.

17. Strong reliance was, however, placed by learned counsel for the assessee on the case of Shyam Lal Vs. State, . That was a case under the Prevention of Food Adulteration Act and during the pendency of the trial, the punishing section was amended reducing the rigour of the law and, accordingly, it was held that the court has to take into consideration the law as it exists on the date of the judgment and the principle that a penal statute should be construed beneficially in favour of the accused was applied. I have already referred to an Allahabad decision which is directly on the point and against the assessee. Therefore, it is not necessary to deal with this authority in detail which would have no direct application.

18. It was also contended that the amendment being procedural in nature-must be deemed to apply with retrospective effect. This contention has also no force and does not call for any discussion.

19. The question is beyond all controversy and has been set at rest by the decision of the Supreme Court in the case of Brij Mohan Vs. Commissioner of Income Tax , New Delhi, , where it has been firmly held that in view of the change of law, the law applicable is the law operating on the date when the return is filed. Unfortunately, the Tribunal misconstrued this decision.

20. Dates of filing of the return have already been seen earlier which were prior to the date of the coming into force of the 1976 amendment.

21. The Tribunal, therefore, was clearly in error and misdirected itself in holding that the penalty has to be determined with reference to the law prevailing on the date of the passing of the order.

22. The answer to the question, therefore, must be that the Tribunal was not correct in holding that the penalty on the facts of the case was leviable with reference to the amended law.

23. In the facts and circumstances of the case, however, I shall make no order as to costs.

K.P. Mohapatra, J.

I agree.