

(1976) 12 MAD CK 0019

In the Madras High Court

Case No : Tax Case No. 417 of 1971 (Reference No. 132 of 1971)

Commissioner of Income Tax

APPELLANT

Vs

Smt. Vijayanthimala

RESPONDENT

Date of Decision : 14-12-1976

Acts Referred:

Income Tax Act, 1961 — Section 220, 220(2), 221, 221(1)

Citation : (1976) 12 MAD CK 0019

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

Bench : Division Bench

Advocate : J. Jayaraman and Nalini Chidambaram, for the Appellant; K.R. Ramamani as Amicus Curiae, for the Respondent

Judgement

Ismail, J.—The Income Tax Appellate Tribunal, Madras Bench, u/s 256(1) of the Income Tax Act, 1961, hereinafter referred to as "the

Act", at the instance of the Commissioner of Income Tax (Central), Bombay, has referred the following question for the opinion of this court:

Whether, on a proper interpretation of the provisions of Section 221 of the Income Tax Act, 1961, the Tribunal was justified in holding that no

penalty can be levied if on the date of order imposing penalty, there was no tax in arrears?

2. The facts lie within a very narrow compass. With reference to the assessment year 1969-70, the assessee had to pay a sum of Rs. 96,360 as

advance tax. The second instalment of Rs. 24,090 was payable on or before September 1, 1968. The assessee paid that amount actually on

October 8, 1968. After the amount was paid, on October 17, 1968, the Income Tax Officer issued a notice to the assessee calling upon her to

show cause why a penalty should not be levied on her. The assessee replied

stating that since the amount had been paid on October 8, 1968, itself the penalty proceedings might be dropped. The Income Tax Officer held that the amount was due and payable on September 1, 1968, and that as the amount was paid on October 8, 1968, only, the assessee was liable to penalty u/s 221(1) of the Act. Accordingly, he imposed a penalty of Rs. 1,200.

3. Against the order of the Income Tax Officer, the assessee preferred an appeal to the Appellate Assistant Commissioner of Income Tax. The

Appellate Assistant Commissioner set aside the order of penalty. He pointed out that under the relevant provisions of the Indian Income Tax Act,

1922, penalty was not being levied, if, on the date of the penalty, tax had been already paid, even though it was not paid on the due date and that

in fact the Income Tax Officers were suo motu cancelling such penalties levied if it was proved that the tax had been paid before the date of the

penalty order, though not on the due date, presumably under the departmental instructions.

4. Against the order of the Appellate Assistant Commissioner, the department preferred an appeal to the Tribunal and the Tribunal dismissed the

appeal. The Tribunal took the view that, on the date when the penalty was levied, the tax must be in arrears and that since in the present case the

tax had already been paid even before the issue of the notice to show cause why penalty should not be levied, no penalty was leviable. It is the

correctness of this conclusion of the Tribunal that is challenged in the form of the question extracted already in this reference.

5. Section 221(1) of the Act, on the relevant date, read as follows:

When an assessee is in default or is deemed to be in default in making a payment of tax, he shall, in addition to the amount of the arrears and the

amount of interest payable under Sub-section (2) of Section 220, be liable to pay by way of penalty, an amount which, in the case of a continuing

default, may be increased from time to time, so, however, that the total amount of penalty does not exceed the amount of tax in arrears:

Provided that before levying any such penalty the assessee shall be given a reasonable opportunity of being heard.

6. Section 218 of the Act states as to when an assessee is deemed to be in default. Sub-section (1) of that section reads :

If any assessee does not pay on the specified date any instalment of advance tax that he is required to pay u/s 210 and does not, before the date

on which any such instalment as is not paid becomes due, send under Sub-section (1) or Sub-section (2) of Section 212 an estimate or a revised

estimate of the advance tax payable by him, he shall be deemed to be an assessee in default in respect of such instalment or instalments.

7. u/s 218(1), as we have pointed out already, the assessee had to pay the instalment in question on or before September 1, 1968, and she

actually paid the same only on October 8, 1968. Therefore, it is clear that the assessee did not pay the amount on the due date and paid it only

later. The question for consideration is whether, in that context, the assessee had incurred any liability to penalty or not u/s 221 of the Act. It is

conceded by the learned standing counsel for the department that there is no direct decision on this point. Consequently, we have to construe the

section in the light of the language employed therein. Since the assessee was not represented before us we requested Mr. K.R. Ramamani,

advocate, to assist the court as amicus curiae and we have heard his arguments.

8. The section which we have extracted already, namely, Section 221(1), will clearly show that an assessee in default in making the payment of tax

incurs a liability to penalty because the section uses the expression ""shall be liable to pay by way of penalty"". In our opinion, once an assessee has

failed to pay the amount on the due date, default has occurred and the assessee has incurred the liability to penalty for the said default. The fact that

the assessee has subsequently paid the amount, whether it was before the Income Tax Officer issued the notice or after he issued the notice cannot

wipe out or efface the default which had already occurred and the consequent liability which the assessee had incurred. Therefore, we are unable

to accept the view of the Tribunal that for the imposition of the penalty, the tax must be in arrears on the date when the penalty was levied.

9. The argument that was advanced by Mr. K.R. Ramamani was that the section uses the expression ""amount of tax in arrears"" towards the end

and that consequently it contemplates the existence of arrears on the date of the order levying the penalty. He also drew our attention to the fact

that the section itself states that the arrears will be in addition to the amount of the arrears of tax as well as the amount of interest payable under

Sub-section (2) of Section 220 and also emphasises that on the date when the penalty is imposed, the arrears of tax as well as the interest must be

due from the assessee. We are unable to accept this argument. The significance of using the expression ""in addition to the amount of the arrears

and the amount of interest payable under Sub-section (2) of Section 220"" is to make it clear that the penalty does not take the place of the tax in

arrears and the interest payable, but it is in addition to those amounts. In other words, the mere imposition of penalty does not absolve the assessee

from his obligation and liability to pay the arrears of tax and interest, but it merely imposes an additional obligation to pay the penalty. Therefore,

we are unable to accept the argument that simply because the tax has been paid even before the issue of the notice and a fortiori before the order

imposing penalty, the penalty itself becomes illegal because on the date of the levy of penalty, there were no arrears of tax.

10. The language of Section 218(1) of the Act to which we have already drawn attention makes it clear that a default in payment of the advance

tax is committed the moment advance tax was not paid within the time stipulated. It may be, because of the statutory requirement, that no penalty

can be levied without giving a reasonable opportunity to the assessee, the officer concerned will have to issue a notice and after hearing the

assessee, he will have to come to a conclusion whether the penalty should be levied and if so in what amount. But it cannot be held that the default

must continue to exist even on the date of the issue of the notice or on the date when the penalty is levied. It is one thing to say that a default had

not occurred and it is another thing to say that a default did occur, but ceased to exist subsequently by the payment of arrears by the assessee after

the due date. What the section seeks to penalise is the commission of default on the failure of the assessee to pay the tax within the time and the

expression ""a continuing default"" occurring in the section emphasises this position. Therefore, we are of the view, simply as a matter of

interpretation of Section 221(1) of the Act, that an assessee incurs a liability to penalty the moment default has occurred, notwithstanding the fact

that the default has ceased to exist by the time the authorities concerned take action to penalise the assessee for the said default.

11. We may also point out, simply as a matter of construction, that by committing the default an assessee only incurs the liability to penalty and that

it does not mean that in every case the officer is bound to levy a penalty. It is worthwhile noting that the section itself has not prescribed a minimum penalty which must necessarily be imposed in every case where default has occurred. Even though an assessee has committed default in the sense that he has not paid the tax within the time stipulated, the officer concerned may not impose a penalty taking into account the circumstances under which the default occurred. For instance, an assessee might have failed to pay the tax simply by oversight and might have paid the same a day after the due date. Technically, a default has occurred and the assessee has incurred the liability to penalty. But certainly that will not be a case warranting levy of penalty. It is not necessary for us to multiply such instances. All that we are interested in pointing out is that simply because an assessee has incurred the liability to penalty, it is not obligatory on the part of the officer to levy a penalty and that whether penalty should be levied or not and if so what should be the quantum of the penalty will depend upon the particular facts and circumstances of each case, which will primarily concern whether the default was wilful or merely accidental.

12. Our attention was drawn to a decision of the Calcutta High Court in Commissioner of Income Tax Vs. Vegetable Products Ltd., and that of the Supreme Court in the same case, namely, The Commissioner of Income Tax, West Bengal 1, Calcutta Vs. Vegetables Products Ltd., . We are of the opinion that as these decisions were concerned with the interpretation of Section 271(a)(i) of the Act, they are not of much assistance in construing the scope of Section 221(1) of the Act with which alone we are concerned.

13. Our attention was then drawn to a decision of this court in T.R. Rajakumari and Others Vs. Income Tax Officer, Central Circle VI, Madras, . Though that case was concerned with Section 221 of the Act, the point that was considered by the learned judge in that case was, whether penalty could be levied after the right to recover the advance tax was barred under the provisions of the Act. Consequently, that case also is not of any assistance for considering the scope of Section 221 of the Act with reference to the particular situation with which we are concerned in the present case.

14. The only judgment which throws some light on the scope of Section 221 of

the Act is the judgment of the Orissa High Court in Commissioner of Income Tax Vs. Venilal Dwarkadas Mehta, . A Bench of the Orissa High Court in that case observed :

We have no doubt in our minds that unless there is a condonation of the past default, even when the demand has been already satisfied, penalty is

leviable on the basis of the past default. The decision in the case of Commissioner of Income Tax Vs. Vegetable Products Ltd., relied upon by Mr.

Mohanty for the assessee in support of his contention that no penalty is payable unless on the date of imposition of penalty payment is due, cannot

be accepted. That was a case of penalty u/s 271(1)(a) of the Act. In a very different setting and dealing with the provisions of Section 271(1) of

the Act, their Lordships decided that in calculating the penalty leviable u/s 271(1)(i) of the Act, the amount paid by the assessee under the

provisional assessment u/s 23B of the 1922 Act is to be deducted from the amount of tax determined u/s 23(3) in order to determine the amount

of tax on which computation of penalty was to be based. We have no doubt in our minds that in regard to past liability penalty is leviable even after

the liability has been satisfied because satisfaction of the demand at a subsequent date does not wipe out the liability created under the statute for

the past default and it cannot be laid down as a proposition of law that there must be an existing default in order that an appropriate authority may

have jurisdiction under the Act to impose penalty for any default.

15. The above observation is in accordance with the view we have taken on the construction of Section 221 of the Act in the present case.

16. In view of this conclusion of ours on the scope of Section 221 of the Act, the question referred to this court will have to be and is answered in

the negative and against the assessee.

17. Since the Tribunal has held that no penalty can be levied because the tax had been paid even prior to the issue of the notice and we are taking

the view that, notwithstanding the payment of the tax, the section is applicable, the Tribunal will have now to decide the appeal preferred by the

department with reference to the penalty actually levied. We have already indicated that the mere incurring of a liability by the assessee does not

automatically compel the Income Tax Officer to impose a penalty and that the Income Tax Officer has to decide in each case whether any penalty

should be levied at all and, if so, what should be the quantum of the penalty. The Tribunal will have now to consider this question and dispose of the appeal preferred by the department finally.

18. We make it clear that we have not expressed any opinion on the question whether Section 221 of the Act can be applied at all to a default in payment of advance tax, since that did not arise for consideration, in view of the terms in which the question has been referred to this court, and we have proceeded only on the assumption that Section 221 of the Act applies to a case of default in payment of advance tax also.

19. There will be no order as to costs.

20. We place on record our appreciation of the assistance rendered by Mr. K.R. Ramamani at our request.