
(1980) 11 KL CK 0026

In the High Court Of Kerala

Case No : Income-tax Reference No. 42 of 1976

Commissioner of Income Tax

APPELLANT

Vs

Varkey Chacko

RESPONDENT

Date of Decision : 07-11-1980

Acts Referred:

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

Citation : (1981) 21 CTR 334 : (1981) 1 ILR (Ker) 394 : (1982) 136 ITR 733

Hon'ble Judges : V. Balakrishna Eradi, C.J.;G. Balagangadharan Nair, J

Bench : Division Bench

Advocate : P.K. Ravindranatha Menon, for the Appellant; K.S. Paripoornan and G. Sivarajan, for the Respondent

Judgement

Balakrishna Eradi, C.J.—The Income Tax Appellate Tribunal, Cochin Bench (hereinafter called "the Tribunal"), has referred to this court u/s 256(2) of the I.T. Act, 1961 (for short "the Act"), the following question of law pursuant to the order dated 31st May, 1977, passed by this court in O. P. No. 887 of 1977, filed by the Commissioner of Income Tax :

"Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in law in holding that the Income Tax Officer had no jurisdiction to levy the penalty and that he should have referred the case to the Inspecting Assistant Commissioner for imposition of penalty ?"

2. For the assessment year 1968-69, the relevant accounting period in respect of which was the year that ended on March 31, 1968, the assessee had filed his return on April 16, 1970. The assessment was completed by the ITO on March 27, 1972, and on the same date itself the ITO initiated penalty proceedings against the assessee on the basis of a finding reached by him in the assessment order that there had been concealment of income by the assessee in respect of an amount which did not exceed Rs. 25,000. After considering the objections put forward by the assessee, the ITO by his order dated March 26, 1974, imposed a penalty of Rs. 10,000 for concealment of income. The AAC before whom the

matter was carried in appeal by the assessee set aside the aforesaid order passed by the ITO on the ground that the ITO had no jurisdiction to levy the penalty since the minimum penalty imposable exceeded the sum of Rs. 1,000. In so holding, the AAC had proceeded on the basis that the jurisdiction of the ITO in relation to the proceeding for the imposition of the penalty in the instant case was governed by the provisions of Sub-section (2) of Section 274 of the Act as they stood prior to the amendment introduced therein by the T.L. (Amend.) Act, 1970. Accordingly, the AAC held that the only competent authority who could levy a penalty in the case was the IAC. The department carried the matter in appeal before the Tribunal. The Tribunal confirmed the order of the AAC holding that the law governing the imposition of penalty for concealment of income is the law that was in force on the date on which the return in which concealment is said to have taken place was furnished before the ITO and that the amendments made by the T.L. (Amend.) Act, 1970, empowering the ITO to levy penalty in cases where the minimum penalty imposable is less than Rs. 25,000 had no application to the instant case because the amendment had not been made expressly retrospective. The Tribunal was further of the view that the aforesaid amendment introduced in Section 274(2) in 1970, empowering the ITO to levy penalty in cases where the minimum penalty imposable is less than Rs. 25,000, could not apply to the penalty proceedings initiated after the Amendment Act came into force in respect of a return furnished on a date prior to the coming into force of the amended provision because "the provision with regard to the specification of authority for imposition of penalty unlike the provision for time-limit for completion of penalty proceedings is substantive and not procedural in law". It is the legality and correctness of the aforesaid reasoning stated by the Tribunal in support of its conclusion affirming the order of the AAC that we are called upon to examine and decide in this case.

3. Section 271 of the Act confers power on the ITO/the AAC for imposition of penalty on an assessee on the ground of, (a) failure to furnish the return of total income without reasonable cause, or (b) failure to comply with a notice issued u/s 142(1) or Section 143(2) of the Act without reasonable cause, or (c) concealment of particulars of his income or furnishing of inaccurate particulars of his income. Section 272 empowers the ITO to levy penalty on the ground of failure to give notice of discontinuance of business or profession as required by Section 176(3). By Section 273 the ITO is invested with the power to impose penalty on an assessee who has either furnished u/s 212 an estimate of advance tax payable by him which he knew or had reason to believe to be untrue, or has without reasonable cause failed to furnish an estimate of advance tax payable by him. Then we come to Section 274 which section has been given the marginal heading "Procedure".

4. Sub-section (1) thereof lays down that no order imposing a penalty shall be made unless the assessee has been heard or has been given a reasonable opportunity of being heard. Sub-section (2) of Section 274, which is the provision with which we are directly concerned, was amended by Section 49 of

the T.L. (Amend.) Act, 1970, with effect from April 1, 1971. Prior to the said amendment the said sub-section was in the following terms ;

"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."

5. After the amendment introduced by the T.L. (Amend.) Act, 1970, Sub-section (2) was in the following terms ;

"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."

6. We are not referring to the further amendments subsequently effected in the Sub-section since they are not relevant for the decision of the present case.

7. The question to be considered is whether the proceedings for imposition of penalty taken in the present case are governed by the provisions of Sub-section (2) as they stood prior to the amendment of 1970 or whether it is the Sub-section as amended that would apply to the case. While counsel appearing on behalf of the revenue contended before us that the jurisdiction of the ITO in relation to the penalty proceedings is to be determined with reference to the law as it obtained on the date when such proceedings were initiated, counsel for the assessee argued that it is with reference to the law in force as it stood on the date of commission of offence, namely, the date of filing of the return by the assessee, that the jurisdiction of the officer has to be determined. Reliance was placed by counsel for the assessee on the rulings of the Madras High Court in *Commissioner of Gift-tax Vs. C. Muthukumaraswamy Mudaliar*, , and *Continental Commercial Corporation Vs. Income Tax Officer and Another*, , as supporting his contention that the provisions of Sub-section (2) of Section 274, as they stood on the date of filing of the return, should govern the present case. *Commissioner of Gift-tax Vs. C. Muthukumaraswamy Mudaliar*, was a case that arose under the G.T. Act, 1958. In that case, penalty proceedings were initiated against the assessee u/s 17(1)(a) of the G.T. Act, on the ground that the assessee had, without reasonable cause, failed to file a return within the prescribed time-limit which expired on 30th June, 1962. By an amendment effected in Section 17(1) (a) by the G.T. (Amend.) Act, 1962, which came into force with effect from 1st April, 1963, a provision for the imposition of a minimum penalty was introduced.

The question that arose before the Madras High Court was whether the said provision for the imposition of a minimum penalty was applicable to the case on hand. The court held that the relevant date for the purpose of finding out the law that was applicable for levying the penalty was the date of commission of the offence, namely, the failure to furnish the return in time. Accordingly, it was held that the law as it stood on 30th June, 1962, governed the proceedings and the provision for the imposition of minimum penalty had no application to the case. The legal position is well established that the quantum of penalty to which a person can be subjected in connection with the commission of an offence is to be determined with reference to the law governing the matter as it stood on the date of commission of the concerned offence. In the decision aforesaid the Division Bench of the Madras High Court has only applied the said principle and held that the quantum of penalty to be levied in proceedings u/s 17(1)(a) of the G.T. Act, for the offence of failure to file the return within the prescribed time should necessarily be governed only by the law as it stood on the date when the assessee committed the offence, namely, 30th June, 1962, which was the last date before which the return had to be filed. The question that we are now called upon to decide in this case is altogether different. Briefly stated, the point to be considered is whether the jurisdiction and power of the ITO to levy penalty against an assessee u/s 271 of the Act read with Section 274 is to be determined with reference to the state of the law as on the date when the assessee filed his return, or whether it is the law in force on the date of finalisation of the assessment and initiation of the penalty proceedings that would govern the matter. The decisions laying down that the quantum of penalty that can be levied against an assessee is governed by the law as on the date of commission of the offence for violation of which the penalty is imposed are based on the principle that the extent of penal liability for the commission of an offence must be governed by the law in force as on the date on which the offence is committed. In our opinion, the said principle can have no application in deciding the question about the competence of the ITO to initiate the penalty proceedings. Hence, the observations of the Supreme Court in *Brij Mohan Vs. Commissioner of Income Tax*, New Delhi, , that when penalty is imposed on account of the commission of a wrongful act it is the law operating on the date on which the wrongful act is committed which determines the quantum of the penalty leviable cannot be of any assistance to the assessee in this case.

8. Strong reliance was placed by counsel for the assessee on the ruling of a Division Bench of the Madras High Court in *Continental Commercial Corporation Vs. Income Tax Officer and Another*, , where it was held that the amendment effected in Section 274(2) by Act 42 of 1970 had no retrospective effect and hence the jurisdiction of the ITO to levy penalty should be determined with reference to the provisions of the section as they stood on the date on which the assessee filed his return. In that case, the return in respect of the assessment year 1970-71 was filed by the assessee on December 22, 1970. The amendment of Section 274(2) came into force on 1st April, 1971. The assessment order for

1970-71 was made on 25th January, 1973, and a notice u/s 271(1)(c) was issued to the assessee on the same date. The minimum penalty imposable exceeded the sum of Rs. 1,000, but the ITO considered that he had jurisdiction to proceed with the matter in view of the amendment of Section 274(2) by Act 42 of 1970, since the amount of income in respect of which particulars had been concealed did not exceed the sum of Rs. 25,000. He imposed on the assessee a penalty of Rs. 4,000. The assessee filed a revision before the Addl. CIT, Madras, but that revision petition was dismissed. Against the revisional order passed by the Addl. Commissioner the assessee filed a writ petition before the Madras High Court contending, inter alia, that the proceeding initiated by the ITO for imposition of penalty was without jurisdiction. That contention was upheld by the Division Bench of the Madras High Court. The Division Bench considered that the question was not res integra but was already covered by the decision of the same court in Commissioner of Gift-tax Vs. C. Muthukumaraswamy Mudaliar, . Reliance was also placed by the Division Bench on the decision of the Punjab High Court in Commissioner of Income Tax Vs. Bhan Singh Boota Singh, . What was laid down in CGT v. C. Muthukumaraswamy Mudaliar as well as in CIT v. Bhan Singh Boota Singh, was only that the quantum of penalty leviable in respect of an offence is to be determined with reference to the law prevailing on the date when the offence or infringement took place and not with reference to the State of the law as on the date when the penalty proceedings were initiated or completed. Neither of these decisions has dealt with the question of jurisdiction or competence of the officer concerned to exercise the power of imposition of penalty. If we may say so, with respect, this distinction has not been noticed by the Madras High Court when it observed that the question relating to the jurisdiction of the ITO for taking penalty proceedings which subsequently arose before it in Continental Commercial Corporation Vs. Income Tax Officer and Another, , was already covered by the earlier decision in Commissioner of Gift-tax Vs. C. Muthukumaraswamy Mudaliar, and by the judgment of the Punjab High Court in Commissioner of Income Tax Vs. Bhan Singh Boota Singh, . As already indicated by us, the principle that the penal liability of a person in respect of an offence committed by him is governed by the law actually in force as on the date of the commission of the offence cannot have application in determining which authority is competent to initiate proceedings for imposition of penalty in respect of the commission of any offence or infringement under the Act. We are clearly of opinion that the competence or jurisdiction of the authority to initiate the penalty proceedings can be governed only by the law which is in force on the date of such initiation of proceedings. A combined reading of Section 271(1)(c)(iii) of the Act (along with the Explanation thereto) and Sub-section (2) of Section 274 provides a clear indication that under the provisions of Sub-section (2) of Section 274, as they stood prior to the amendment of 1970, the competence of the ITO to exercise the power of imposition of penalty against an assessee under Clause (c) of Section 271(1) was to depend upon the findings arrived at by him in the assessment proceedings as to the factum of concealment and the amount of the income in respect of which

such concealment had taken place. It is only on arriving at such a finding that concealment has taken place that the question of initiation of penalty proceedings against an assessee can arise. In this connection, we may with advantage extract the following observations made by the Supreme Court in *Jain Bros. and Others Vs. The Union of India (UOI) and Others*, :

" It is obvious that for the imposition of penalty it is not the assessment year or the date of the filing of the return which is important but it is the satisfaction of the Income Tax authorities that a default has been committed by the assessee which would attract the provisions relating to penalty. Whatever the stage at which the satisfaction is reached, the scheme of Sections 274(1) and 275 of the Act of 1961, is that the order imposing penalty must be made after the completion of the assessment. The crucial date, therefore, for purposes of penalty, is the date of such completion."

9. The words used by Parliament in the provision in Sub-section (2) of Section 274 as amended in 1970, "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" also clearly point to the conclusion that the point of time material for determining which authority is competent to exercise the power of imposition of penalty u/s 271(1)(c) of the Act is the date of initiation of the penalty proceedings which would ordinarily be the date of completion of the assessment itself. This position is quite consistent with the principle recognised in general law that the jurisdiction of an authority or tribunal to suo motu initiate a proceeding, or to entertain a dispute or claim filed before it is governed by the relevant provision of law that is in force- as on the date of initiation or institution of such proceeding. We would accordingly hold that the jurisdiction of the ITO to impose penalty against an assessee under Sections 271(1)(c) of the Act read with Section 274(2) is governed by the state of the law as obtaining on the date of initiation of the penalty proceeding. We are supported in this view by the observations contained in *Commissioner of Income Tax Vs. Raman Industries*, and *Commissioner of Income Tax, Gujarat-IV Vs. Balabhai and Co.*, . The question that arose in both those cases was whether by reason of the amendment effected in Section 274(2) by Act 42 of 1970, the IAC of Income Tax, before whom a penalty proceeding u/s 271(1)(c) of the Act was pending, would cease to have jurisdiction to deal with the matter by reason of the fact that the amount of income in respect of which concealment had taken place did not exceed Rs. 25,000. P.D. Desai J., speaking on behalf of the Bench of the Gujarat High Court in *Commissioner of Income Tax, Gujarat-IV Vs. Balabhai and Co.*, , held that the jurisdiction of the IAC to deal with a penalty proceeding was governed by the law which was in force at the time when the penalty proceedings were initiated and it remained unaffected by the subsequent change introduced in that law by the Amending Act of 1970. Endorsing the same view, Mittal J., speaking on behalf of the Division Bench of the Punjab High Court in *Commissioner of Income Tax Vs. Raman Industries*, observed that the

jurisdiction of a tribunal to try a case was a vested right and was to be determined according to the law in force at the time of institution of the proceeding, and, on the basis of the said principle, the jurisdiction of the IAC to deal with a penalty proceeding is to be looked at as on the date of initiation of that proceeding and not with reference to any subsequent events. The following observations made by Divan C.J., speaking on behalf of a Division Bench of the Andhra Pradesh High Court, in Addl. Addl. Commissioner of Income Tax Vs. Dr. Khaja Khutabuddinkhan, , also give expression to the same view (p. 912):

" It is clear so far as the question of the Inspecting Assistant Commissioners' jurisdiction is concerned, that at the time when the matter came to be referred, to him by the Income Tax Officer and the law as it stood on the date of that reference, he was the only officer who could have heard the matter because the minimum penalty imposable was more than Rs. 1,000. If during the, time, when the matter was pending before the Inspecting Assistant Commissioner the law was changed by Act 42 of 1970 with effect from April 1, 1971, and the minimum penalty for the purpose of making a reference to the Inspecting Assistant Commissioner came to be raised to Rs. 25,000, it does not mean that the jurisdiction of the Inspecting Assistant Commissioner was taken away."

10. We are in respectful agreement with the view expressed in the aforecited rulings that the jurisdiction of the ITO/IAC to initiate proceedings for the imposition of penalty against an assessee u/s 271(1)(c) of the Act read with Section 274(2) is to be determined with reference to the provisions of law in force as on the date of initiation of such proceedings. We are unable to accept as correct the view expressed by the Division Bench of the Madras High Court in Continental Commercial Corporation Vs. Income Tax Officer and Another, , that it is the law which was in force on the date of filing of the return by the assessee that would govern the jurisdiction of the concerned authority to impose penalty u/s 271(1)(c) of the Act.

11. Accordingly, we hold that the Tribunal was in error in holding that the ITO had no jurisdiction to levy penalty against the assessee in the instant case and that he should have referred the case to the IAC under the provisions of Section 274(2) as they stood prior to the amendment of 1970 since the minimum penalty imposable exceeded Rs. 1,000. Inasmuch as the amendment introduced in Section 274(2) by Act 42 of 1970 had come into force prior to the initiation of the penalty proceedings and the amount of income in respect of which concealment had taken place did not exceed Rs. 25,000, the ITO was fully competent to impose the penalty on the assessee.

12. In the result, we answer the question referred in the negative, that is, against the assessee and in favour of the department. The parties will bear their respective costs.

13. A copy of this judgment under the seal of this court and the signature of the Registrar will be forwarded to the Tribunal as required by law.