

(1992) 11 GUJ CK 0008
In the Gujarat High Court

Case No : Income-tax Reference No's. 50 and 50A of 1980

Commissioner of Income Tax

APPELLANT

Vs

Yogendrakumar H. Thakkar

RESPONDENT

Date of Decision : 11-11-1992

Acts Referred:

Income Tax Act, 1961 — Section 139, 139(1), 271(1), 80P(2), 81

Citation : (1993) 204 ITR 300

Hon'ble Judges : S.D. Dave, J;G.T. Nanavati, J

Bench : Division Bench

Advocate : B.J. Shelat, for the Appellant; H.M. Talati, for the Respondent

Judgement

G.T. Nanavati, J.—At the instance of the Revenue, the following question is referred to this court u/s 256(1) of the Income Tax Act, 1961 :

"Whether, on the facts and circumstances of the case, the Appellate Tribunal was right in law in striking down the impugned orders of the Income Tax Officer altogether instead of leaving the Income Tax Officer at liberty to make fresh rectificatory orders after curing the infirmity noticed by the Tribunal ?"

2. This reference pertains to two assessment years 1967-68 and 1969-70. The assessee had filed his returns late. The return for the assessment year 1967-68 was filed on May 7, 1968, and for assessment year 1969-70, it was filed on March 7, 1972. As there was delay in filing the returns, show-cause notices were issued to the assessee u/s 271(1)(a) of the Act. Relying upon the decision of the Supreme Court in the case of The Commissioner of Income Tax, West Bengal 1, Calcutta Vs. Vegetables Products Ltd., , the Income Tax Officer held that the penalty leviable was nil for both those years. After these orders were passed by the Income Tax Officer, section 271(1)(a) was amended retrospectively, i.e. from April 1, 1962. As a result of that amendment, for the purpose of computation of penalty, what was required to be considered was the tax as reduced by the tax deducted at source or paid in advance and not the tax paid along with the return.

Rectification proceedings were, therefore, initiated and, for the assessment year 1967-68, the Income Tax Officer levied penalty of Rs. 1,635 and, for the assessment year 1969-70, the penalty levied was Rs. 4,355.

3. The assessee, therefore, preferred an appeal to the Appellate Assistant Commissioner but without any success as the appeal came to be dismissed. The assessee thereupon preferred two separate appeals to the Appellate Tribunal. It was urged before the Tribunal that penalty was levied without recording a finding that the assessee had no reasonable cause for late filing of the returns. The Tribunal relying upon the decision of this court in the case of Addl. Commissioner of Income Tax, Gujarat Vs. I.M. Patel and Co., , held that the Department having failed to establish that the failure to file the return within time was without reasonable cause, the penalty orders were illegal. The Tribunal, therefore, allowed both the appeals. The Commissioner of Income Tax, therefore, moved the Tribunal by making two separate applications to refer the above referred question to this court.

4. What is contended by learned counsel for the Revenue is that the sole basis of the Tribunal's order is the decision of this court in the case of Addl. Commissioner of Income Tax, Gujarat Vs. I.M. Patel and Co., . That decision has been reversed by the Supreme Court. Therefore, the order passed by the Tribunal must be held to be bad in law. In the case of Addl. CIT v. I. M. Patel and Co. : [1992]196ITR297(SC) , the Supreme Court has held that there is nothing in section 271(1)(a) of the Income Tax Act, 1961, which requires that means rea has to be established by the Department before penalty can be levied under that section for delay in filing the return. It is for the assessee, should be file a belated return, to show "reasonable cause" for the delay. Therefore, it will have to be held that the Tribunal was not right in striking down the impugned orders of penalty passed by the Income Tax Officer.

5. It was, however, urged by learned counsel for the assessee that, while passing the assessment orders, the Income Tax Officer had charged interest u/s 139 of the Act in both these cases. That would imply that the Income Tax Officer had extended the time for filing the returns u/s 139(1) of the Act and, therefore, really the penalty provision was not attracted at all as the returns must be deemed to have been filed within the extended period of time. Learned counsel for the Revenue, however, submitted that no such plea was specifically taken either before the Appellate Assistant Commissioner or before the Tribunal and, therefore, we should not consider that plea now and send the matter back to the Tribunal for reconsidering the same. It is no doubt true that such a plea was not specifically taken before the tax authorities or before the Tribunal. However, it is an admitted position that interest was levied u/s 139 of the Act. The Income Tax Officer could not have levied interest without applying the proviso which provides for extension of time. Though there is no material on record to show that the assessee had applied for extension of time, we will have to presume that the Income Tax Officer had passed the order in lawful exercise of his powers and,

therefore, a presumption will have to be raised that the time for filing the return was extended by the Income Tax Officer. Once such a presumption is raised, it will have to be further held that the returns were filed within the extended period of time and, therefore, the provision for levying penalty did not become applicable. No doubt the presumption to be raised is a rebuttable presumption and it can be rebutted by the Department, but there is no material on the basis of which we can say that the Department has rebutted such a presumption in this case. As a presumption will have to be raised in this case because of charging of interest, it will have to be further held that the assessee had filed the returns within the extended period of time. Considering this fact and the fact that these two cases retain to the assessment years 1967-68 and 1969-70, we do not think it fit to send the matter back to the Tribunal. Therefore, even though the basis on which the Tribunal set aside the order of the Income Tax Officer is found to be wrong, the order passed by it will have to be held as proper in view of the facts and circumstances of the case. We accordingly, answer the question referred to us in the affirmative, i.e. against the Revenue and in favour of the assessee, with no order as to costs.

6. The Tribunal ought to have made two separate references as they were from two different appeals. We, therefore, direct the office to give separate numbers, treating Income Tax Reference No. 50 of 1980 as a reference arising from I.T.A. No. 1002 of 1978 and give Income Tax Reference No. 50A of 1980 to the reference arising from I.T.A. No. 1003 of 1978.