
(1995) 10 GUJ CK 0016
In the Gujarat High Court
Case No : WT Ref. No. 6 of 1981

Commissioner of Wealth Tax	Vs	APPELLANT
Maniben Mahadev		RESPONDENT

Date of Decision : 06-10-1995

Acts Referred:

Wealth Tax Act, 1957 — Section 18(1), 18(2A), 18(2B), 23

Citation : (1996) 220 ITR 259

Hon'ble Judges : Rajesh Balia, J;M.S. Shah, J

Bench : Division Bench

Advocate : B.J. Shelat, for M.R. Bhatt and Co, for the Appellant; None, for the Respondent

Judgement

Rajesh Balia, J.—The Tribunal, Ahmedabad "A" Bench at the instance of CWT, Rajkot has referred the following questions of law arising

out of its order dt. 28th Feb., 1980 in WTA No. 142/Ahd/1978-79 for the asst. yr. 1969-70 :

1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the order of the WTO levying penalty

under s. 18(1)(a) was not passed in pursuance to CWT's order under s. 18(2A) and there was thus a right of appeal available to the assessee

without any bar of s. 18(2B) of the WT Act ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal has been right in law in confirming the order of the AAC when the ITO

had reduced the penalty to 50% of the minimum in view of the order of the CWT made on the application of the assessee under s. 18(2A) of the

Act ?

3. Whether, on the facts and in the circumstances of the case, the appeal against

the order of the WTO imposing penalty of Rs. 14,520 being 50% of the minimum penalty imposed on account of the order of the CWT made under s. 18(2A) of the Act was competent in view of the provisions contained in s. 18(2B) of the Act ?

4. Whether, on the facts and in the circumstances of the case, the Tribunal has been right in law in confirming the order of the AAC in cancelling the penalty of Rs. 14,520 imposed by the WTO for late filing of the return under s. 18(1)(a) of the Act ?

The questions relate to levy of penalty under s. 18(1)(a) of the WT Act for late filing of return for the asst. yr. 1969-70.

2. The facts necessary for the present purposes are that the assessee filed return of his net wealth for the asst. yr. 1969-70 on 23rd Jan., 1971. As

the return was filed late, a notice was issued to the assessee by the WTO to show cause as to why for late filing of return penalty be not levied.

The assessee pleaded existence of reasonable cause for not submitting the return of net wealth within time. He simultaneously also approached the

CWT under s. 18(2A) of the WT Act for reducing or waiving the penalty under s. 18(1)(a). Before the WTO could complete the penalty

proceedings in this regard, the CWT made an order for reducing the penalty imposable on the assessee by 50% of the minimum penalty that could

be imposed under the penalty provision. Thereafter, the WTO passed an order on 17th Jan., 1973 rejecting assessee's plea about existence of

sufficient cause for not filing returns within time and finding that the penalty leviable under the section comes to Rs. 29,040, finally levied penalty as

reduced by the order of the CWT under s. 18(2A) of the Act. The assessee appealed against the order of levy of penalty before the AAC. The

AAC found the penalty proceedings are quasi criminal in nature and ingredients of default attracting penalty under s. 18(1)(a) has to be established

by Revenue. The necessary ingredient of default under s. 18(1)(a) is "failure to file return without reasonable cause", and not mere failure to file

return. As Revenue has not established that failure to file return was without reasonable and sufficient cause, he deleted the penalty.

It may be noticed here that the appeal before the AAC was filed late and delay in late filing was condoned. Necessary facts regarding thereto we

shall avert to later on. However, we also notice that no objection as to

maintainability of the appeal was raised before the AAC. Before the Tribunal it was urged that AAC erred in entertaining the appeal when the WTO has merely given effect to order of CWT while exercising powers under s. 18(2A) and reduced the amount of penalty from Rs. 29,040 to Rs. 14,520.

The contention in support of the above submission was that the AAC erred in overlooking the provisions of s. 18(2B) according to which the order under s. 18(2A) would be final and could not be called in question before any Court of law or any other authority the Tribunal rejected the contention and on merits upheld the order of the AAC. It appears that no contentions were raised before the Tribunal on the merits of the case.

3. Coming to the contention of delay in filing appeal before the AAC. We notice from the order that initially the assessee had filed a petition before the High Court under Art. 226 keeping in view the provisions of s. 18(2B). However, as a result of discussion between the assessee's counsel and the counsel for the Revenue in which it was suggested to the counsel for the assessee that in view of order under s. 18(1)(a) being appealable in spite of the petition for waiver before the CIT, the petition was withdrawn to prefer appeal before the appropriate authority.

4. From the perusal of the relevant provision as it existed during the relevant time it would be apparent that when an assessee who has without reasonable cause failed to furnish the return which is required to be furnished under sub-s. (1) of s. 14 or under sub-s. (2) of s. 14 within the time allowed and in the manner required by sub-s. (1) of s. 14, penalty to the extent provided in sub-clause (i) could be levied on the assessee in addition to tax. Words "without reasonable clause" were omitted by Taxation Laws (Amendment & Misc. Provisions) Act, 1986 w.e.f. 10th Sept., 1986. However, proviso was added stating that no penalty was imposable if the person proves that there was reasonable cause for the failure referred to in clause (a) or clause (b) as the case may be of s. 18(1). The present case is governed by the provision as it existed before amendment.

5. Sub-s. (2A) of s. 18 provided that notwithstanding anything contained in clause (i) (under which penalty for late filing of return was prescribed), the CWT may suo motu or on an application made in this behalf reduce or waive

the amount of minimum penalty imposable on a person under clause (i) of sub-s. (1) for failure without reasonable cause to furnish return of net wealth which such person was required to furnish return under sub-s. (1) of s. 14, if he is satisfied that such person has prior to the issue of notice to him for furnishing return has voluntarily and in good faith made full disclosure of his net wealth, and has cooperated in any enquiry carried in assessment of the wealth and has either paid or made satisfactory arrangement for payment of any tax or interest payable in consonance of any order made in that regard.

6. Sub-s. 18(2B) made the order passed under sub-s. (2A) to be final and subject to no further appeal. Under s. 23 appeal is provided against any order passed for levy of penalty under s. 18(1) and further appeal against the order passed by AAC has been provided before the Tribunal.

7. Thus in the light of the aforesaid provisions we have to examine whether any appeal lies against the order of penalty imposed under s. 18(1)(a) where the order of CWT under s. 18(2A) has already come into existence before imposition of penalty by the WTO.

8. From the scheme of the provisions it is apparent that the scope and jurisdiction of the two provisions namely 18(1)(a) and 18(2A) are entirely different and operate in different fields while a penalty becomes imposable under s. 18(1)(a) on account of default on the part of the assessee in

failing without reasonable cause to file return in time. If absence of reasonable cause is not established or the assessee is able to prove the existence

of reasonable cause for not filing the return, no penalty becomes imposable under s. 18(1)(a). On the other hand the exercise of discretion by the

CWT under sub-s. 2(A) assumes the existence of all necessary facts which makes penalty imposable and the discretion of the CWT to reduce or

waive the penalty which is imposable under s. 18(1)(a) rests on considering the factors which have been provided under s. (2A) itself, namely,

whether the assessee has voluntarily disclosed the particulars of net wealth prior to issuance of notice for furnishing return; whether the assessee

has disclosed the particulars of his net wealth truly and whether the assessee cooperated fully in the enquiry necessary for completing the

assessment and lastly whether the assessee has made adequate provision for making payment of any liability on account of tax and interest which

has arisen out of any order passed against him under the provisions of WT Act for the relevant assessment year. At no juncture, the CWT is called upon to determine the question whether the penalty is in fact imposable or not. That is to say the question whether there exists a reasonable cause which prevented the assessee to file his return in time or absence of it is not within the contemplated exercise to be taken by the CWT while exercising power under sub-s. (2A). While the appeal has been provided against the order passed under sub-s. 18(1)(a) to challenge the very basis of levy of penalty no appeal has been provided against the order passed under sub-s. (2A) by the CWT requiring to reduce or waive the penalty or reject the application of the assessee in that regard.

9. We may further notice in this connection that exercise of discretion under sub-s. (2A) does not depend upon application by the assessee but

could be exercised suo motu also. It is also not required that the jurisdiction under sub-s. (2A) could be invoked at any particular stage of

proceedings under s. 18(1)(a) or other provisions as the case may be. The approach to the CWT for reducing or waiving the penalty can be made

at any time, even before the penalty was actually imposed or after the penalty has been imposed, by the authority; the CWT can be approached

even during the pendency of the appeal against the orders imposing penalty or he can also be approached after the remedies of imposition of

penalty has been exhausted. It is one thing to say that the assessee is liable to penalty and penalty is imposable against him and it is quite another

thing to say that though the penalty is imposable but the circumstances exist which warrant the penalty imposable to be reduced or waived.

10. We are fortified in our opinion by a conclusion of decisions.

11. In the case of Shakuntla Mehra Vs. Commissioner of Wealth Tax and Others, considering the scheme of s. 18 the Court laid the following

proposition :

(i) that the proceedings under s. 18(1) whereby the WTO had to impose a penalty and those under s. 18(2A) whereby the CWT had to exercise

his discretion to waive or reduce penalty were entirely different proceedings, the pre-requisites of the orders contemplated by the two provisions

were also different, and the WTO and the CWT had to act on different criteria;

(ii) that under s. 18(2A), the discretion to waive or reduce penalty had to be

exercised by the CWT judicially and if the conditions laid down in the section were fulfilled the CWT was bound to waive or reduce penalty;

(iii) that the mere failure to file return within the time allowed did not make the assessee liable to penalty : there had to be contumacious or

deliberate default; and the onus was on the Department to establish that the assessee had no reasonable cause for not filing it within time.

12. In the case of Commissioner of Wealth Tax, Karnataka-II Vs. B. Kempanna, , the Karnataka High Court held :

It is seen that the power conferred on the CWT was only to reduce or waive the amount of minimum penalty imposable on a person under clause

(i) or clause (iii) of sub-s. (1). Clause (i) of sub-s. (1) was in relation to penalty imposable for failure, without reasonable cause, to furnish the return

of net wealth within the prescribed time. This power could be exercised by the CWT notwithstanding the default and there being no reasonable

cause for the failure to furnish the return within the time prescribed. The question of the existence of reasonable cause was not within the ambit of

the action expected from the CWT under s. 18(2A); that inhered in the WTO. The opening words also indicate that it was only notwithstanding

anything contained in clause (i) or clause (iii) of sub-s. (1) and notwithstanding any other provision in the Act that the CWT could act. This

provision did not override or obliterate the jurisdiction conferred on the other authorities under the Act. The Tribunal observed thus, after referred

to the opening words in s. 18(2A) of the Act.

13. Madhya Pradesh High Court in the case of Jagdish Agarwal Vs. Commissioner of Wealth-tax, expressed the same view in the following terms

:

A perusal of s. 18(2A) will go to show that it proceeds upon the assumption that the assessee has become liable for penalty on his failure to

furnish the return within time without reasonable cause. The waiver of penalty is ordered by the CWT not on the ground that there was reasonable

cause for late filing of return or that the return was not filed late, but upon entirely different considerations. These considerations briefly stated are

that the assessee had made full disclosure of his net wealth voluntarily and in good faith prior to the issue of notice under s. 14(2), has co-operated

in any enquiry relating to the assessment and has either paid or made

satisfactory arrangements for payment of the tax or interest in consequence of an order passed in respect of the relevant assessment year. The circumstances which the CWT has to take into account in passing an order of waiver of penalty are not to be considered by the WTO and, similarly, the facts which the WTO has to examine are not to be examined by the CWT. The two jurisdictions are entirely different and distinct. Therefore, if the CWT refuses to waive the penalty, it cannot be said that there was no reasonable cause for late filing of the return. That question, which is the subject matter of enquiry before the WTO, still remains open and if the WTO decides against the assessee, his finding can be challenged in appeal before the AAC. In our opinion, the right of going up in appeal for challenging an order imposing penalty passed by the WTO remains effective and is not waived simply because the assessee approaches the CWT for waiver of penalty and he refuses to waive penalty under s. 18(2A).

14. The view was followed by the same High Court in the case of Commissioner of Wealth-tax Vs. Kekatpure Ginning and Pressing Factory, .

15. Regarding the difference in the scope of two provisions under the IT Act, the Gujarat High Court in the case of Kherunissa Allibhai Vs.

Commissioner of Income Tax, , has noticed the distinction in the following terms :

When the assessee approaches the CIT under s. 273A he does not dispute his liability to pay the penalty. All that he says is that he should be

given the relief of reduction or waiver by the fact that the conditions specified in s. 273A are satisfied. However, when an assessee files an appeal

against the order of penalty, he is challenging the very imposition of penalty and his effort in the appeal is to show that, in the circumstances of his

particular case, penalty was not imposable at all. This distinction between what can be urged in an appeal and what can be urged in the

proceedings under s. 273A must be clearly borne in mind.

16. In view of the aforesaid clear distinction, in the field of operation of two provisions, it cannot be said that exercise of discretion under sub-s.

(2A) of s. 18 in one way or the other results in defeating assessee's right of appeal to challenge the order of penalty by showing that penalty is not

at all imposable. As we have noticed above, it is one thing to say that penalty is not at all imposable and quite another thing to say that though the

penalty is imposable, the CWT is required to exercise discretion to reduce or

waive the penalty if the conditions necessary for exercising the discretion are shown to exist. In appeal against the order of penalty what is in challenge is the very genesis of levying penalty which was the subject matter of consideration, while exercising of power under sub-s. (2A) proceeds on existence of condition to levy penalty. Order under s. 18(2A) cannot be said to be subject matter of appeal or revision in view of the clear provision of sub-s. (2B) of s. 18.

17. In our opinion, therefore, right of assessee to challenge the very imposability of penalty by the Assessing Officer (AO) is not negated by exercise of discretion under sub-s. (2A) at a stage anterior to actual imposition of penalty by the authority having jurisdiction to levy penalty where the question of leviability of penalty is not at all germane for consideration. Reliance on sub-s. (2B) by the Revenue in support of its contention is, therefore, misplaced. Sub-s. (2B) only deals with the orders passed under sub-s. (2A) the provisions which now find place in s. 18B. It is only the order passed under sub-s. (2A) about the exercise of discretion by the CWT one way or the other as being declared to be final and not amenable to appeal or revision under other provisions of the Act. But the provisions of sub-s. (2B) do not affect the right of appeal conferred on the assessee in respect of the order passed under s. 18(1) against which the right of appeal has specifically been conferred under s. 23.

18. We are fortified in our aforesaid conclusion by the decisions of Delhi, Karnataka and Madhya Pradesh High Courts. In all the above cases the facts were similar to the case at hand.

19. Karnataka High Court in the case of CIT vs. B. Kempanna (supra) held :

Under s. 18(2B), what is made final is the order made under s. 18(2A), i.e., in regard to the quantum of minimum penalty that is directed to be waived or reduced and nothing more. There is no provision that once the assessee filed an application under s. 18(2A) before the CWT, he waives his other rights.

20. In Jagdish case (supra), Madhya Pradesh High Court said :

The two jurisdictions are entirely different and distinct. Therefore, if the CWT refuses to waive the penalty, it cannot be said that there was no reasonable cause for late filing of the return. That question, which is the subject matter of enquiry before the WTO, still remains open and if the

WTO decides against the assessee, his finding can be challenged in appeal before the AAC. In our opinion, the right of going up in appeal for

challenging an order imposing penalty passed by the WTO remains effective and is not waived simply because the assessee approaches the CWT

for waiver of penalty and he refuses to waive penalty under s. 18(2A).

21. The position would be no different if the WTO refuses or waives the penalty. In this connection we may notice that under the provisions as

then existed after coming into force of s. 18B incorporating the provisions of s. 18(2A) and 18(2B), the exercise of discretion by the CWT was

restricted only for one time and once it was so exercised in favour of the assessee in respect of one or more years for some purpose, the assessee

could not approach the CWT second time under that provision. Therefore, the factum whether the penalty is at all imposable or not on which

finding alone the jurisdiction under s. 18 of which assumption jurisdiction under s. 18(2A) or now under s. 18(2B) is attracted and its determination

cannot be negatived merely on the ground that some or full relief regarding payment of penalty has been granted to the assessee in a given case.

22. To the same effect, this view was reiterated by Madhya Pradesh High Court in *Kekatpur Ginning & Pressing Factory's* case (supra).

23. *Kherunisa Allibhai's* case (supra) before this Court was a converse case. In that case, the assessee has challenged the penalty for late filing of

return before the appellate authority and while the appeal was pending the assessee has also approached the CWT for exercise of jurisdiction. On

the ground of pendency of appeal the application was rejected by the CWT. The Court pointing the distinction between the two jurisdictions held

the CWT at fault for not exercising the jurisdiction duly vested in it on irrelevant consideration. But, in effect, in our opinion, the decision supports

our conclusion inasmuch as it has accepted that the two proceedings operate in different fields and the scope of enquiry in the two jurisdictions are

different, the order passed in one jurisdiction does not affect the order passed in another. Subject of course to this that if WTO find that no penalty

is imposable no occasion may arise for exercise of jurisdiction under s. 273A of the IT Act or 18(2A) of the WT Act, as the case may be.

24. Argument was raised before us on the basis of observation made in *Kherunnisa* case (supra) that while the concept of s. 273A is that the

assessee concerned admitted his liability to penalty but relied upon certain mitigating circumstances specified in the section. On the basis of this observation it is contended that once the liability is admitted the right to appeal must be deemed to have been waived. We are unable to read anything of the like in the said observation. In the context in which these observations find place in the order, it is clear that the Court was considering the nature and scope of jurisdiction to be exercised under s. 273A which proceeded on the assumption of existence of liability to penalty under the relevant provisions; and exercise of jurisdiction under s. 273A is not de hors the non existence of liability, that is to say, logically it does not fall for consideration of the CIT to hold that there was reasonable cause for the assessee for not filing the return within time, a fact which would make penalty unimposable and will result in not attracting provisions of s. 273A at all. While exercising the jurisdiction under s. 273A, the CIT had to assume the existence of conditions necessary for imposing penalty and for invoking the jurisdiction of the CIT, the assessee has also to assume the existence of grounds for imposing the penalty, but assuming the existence of grounds for invoking jurisdiction under s. 273A cannot result in assuming that for the purpose of penalty proceedings the assessee admits that the ground for imposing penalty exist. The assumption of existence of liability is only for the purpose of inviting the jurisdiction of the CIT under s. 273A.

25. Reliance was also placed by the learned counsel for the Revenue on a decision of Punjab & Haryana High Court in the case of Amrik Singh Vs. Commissioner of Wealth Tax, . Having carefully gone through the report we are of the opinion that it is of little assistance to the case espoused by Revenue. In the said case, the Tribunal has found that the order of the WTO had been passed to give effect to the order of CWT passed under s. 18(2A) for levying penalty and then the order of the CWT was given effect to raise the demand only to the extent to which the CWT has retained the imposing of penalty. As it appears from the report that the WTO had done nothing more than to give effect to the order passed by the CWT and as the order of the CWT was not appealable, the consequential order passed by the WTO was also not held to be appealable.

26. The Court specifically held :

The orders passed by the WTO simply tantamount to raising demands in conformity with the order passed by the CWT. The assessee cannot take advantage of a wrong label put on the order by the WTO.

27. Bearing in mind the distinct areas of operative field of two jurisdictions, one under s. 18(1)(a) and the other under s. 18(2A) we are of the opinion that even though the quantum of penalty levied was in terms of the decisions of the CWT, the WTO sought to exercise his powers only under s. 18(1)(a) for levying the penalty and, hence, his orders has independent existence and hence, the appeals against those orders were maintainable. Taking any other view would render the penalty order itself invalid, as the same would amount to making of order by WTO, authority entrusted with duty to decide on imposition of penalty, without application of mind by abdicating his authority to CWT, who had no jurisdiction to decide upon whether penalty was at all imposable.

28. However, we may notice here that in the assessee's case, the WTO has not merely proceeded to give effect to the order of CWT but has in his own right laid the foundation for levying the penalty by rejecting the assessee's explanation for not filing return in time and having laid foundation for imposing the penalty and calculated the minimum penalty imposable under the relevant provision, then gave effect to the order of CWT for raising a demand by reducing the minimum imposable penalty by 50%. Therefore, the order of WTO in the present case does not lose its independent character of levying penalty under s. 18(1)(a) and is not an order merely of executive nature in giving effect to the order passed by CWT.

29. In view of the aforesaid discussion, the questions referred to us are answered in affirmative that is to say that the CWT(A) could entertain the appeal from the order of WTO imposing penalty notwithstanding the fact that WTO has quantified the amount of penalty payable to be less than the minimum penalty imposable as per the order of the CWT under sub-s. (2A) of s. 18 of the Act of 1957. There shall be no order as to costs.