

(1978) 12 MAD CK 0039

In the Madras High Court

Case No : Tax Case No"s. 394 of 1974 and 1427 to 1432 of 1977 (Reference No"s. 207 of 1974 and 996 to 1001 of 1977)

Commissioner of Wealth Tax

APPELLANT

Vs

M.K.S. Vanavarayar

RESPONDENT

Date of Decision : 18-12-1978

Acts Referred:

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

Citation : (1980) 122 ITR 184

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

Bench : Division Bench

Advocate : J. Jayaraman and Nalini Chidambaram, for the Appellant; T. Srinivasamurthi, for the Respondent

Judgement

Ismail, J.—These references relate to levy of penalty under the provisions of the W.T. Act, 1957 (hereinafter referred to as " the Act "). We are concerned with assessment years 1962-63 to 1967-68. The assessee in this case is an agriculturist. With regard to the assessment years in question, he did not file the return for the purpose of wealth-tax within the time prescribed by the statute and he filed voluntary returns on December 14, 1970. After having filed the returns the assessee filed an application before the Addl. Commissioner, Madras-II, on January 2, 1971, requesting him to waive the penalty imposable on him for not filing the returns in time. In other words, he expressly invoked the jurisdiction of the Commissioner u/s 18(2A) of the Act. The Commissioner passed an order on July 19, 1971. He reduced the penalty leviable for all these years to 25 per cent. of the minimum penalty leviable and called upon the WTO to pass orders accordingly. Admittedly, this order of the Commissioner was not communicated to the assessee. Pursuant to the order of the Commissioner, the WTO himself passed an order in accordance with the order of the Commissioner levying penalty on the assessee. Against the order of the WTO, the assessee preferred appeals to the AAC, Range-II, Coimbatore. That officer disposed of the appeals on a preliminary ground to the effect that since the Commissioner had

passed orders under Sections 18(2A) and 18(2B) of the Act, that order shall not be called in question before any court of law or any authority and, therefore, no appeal could lie against the penalty orders passed "in pursuance of the Commissioner"s orders u/s 18(2A) of the Act".

2. The assessee took the matter further in appeal to the Income Tax Appellate Tribunal, Madras Bench. The Tribunal by its order dated 30th December, 1972, allowed the appeals preferred by the assessee on the ground that the order of the Commissioner dated July 19, 1971, was not a valid one, since it was not communicated to the assessee, that the order levying penalty was only that of the WTO, that against the order of the WTO appeals were maintainable and that, on the facts of the case, there has been reasonable cause for, the assessee not filing the returns in time. Subsequently, the Tribunal set aside the orders of the WTO levying penalty on the assessee. It is after this order of the Tribunal that the department applied to the Appellate Tribunal u/s 27(1) of the Act for referring a number of questions to this court, said to arise out of the order of the Tribunal. The Tribunal has referred the following questions for the opinion of this court u/s 27(1) of the Act covered by T.C. No. 394 of 1974.

" 1. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the order of the Wealth-tax Officer levying penalty was one u/s 18(1)(a) and was not passed in pursuance of the Commissioner"s order u/s 18(2A) on the assessee"s petition and that, therefore, there was a right of appeal to the assessee ?

2. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the order of the Commissioner of Wealth-tax dated July 19, 1971, was not a valid order u/s 18(2A) and, therefore, the Wealth-tax Officer"s order levying penalty was appealable ?

3. Whether the cancellation of the penalty by the Appellate Tribunal on merits is justified on facts and in law ? "

3. Since the Tribunal declined to refer certain other questions applied for by the department, the department approached this court u/s 27(3) of the Act and this court by its order dated October 27, 1975, in Tax Case Petitions Nos. 47 to 52 of 1975, directed the Tribunal to refer the following questions for the opinion of this court and these questions are covered by Tax Cases Nos. 1427 to 1432 of 1977.

" 1. Whether the Tribunal has jurisdiction to entertain the appeal ?

2. If the answer to question No. 1 is in the affirmative, in view of the fact that the Appellate Assistant Commissioner had not gone into the merits of the case, the Appellate Tribunal should not have set aside the penalty order leaving the field free for fresh disposal by the Commissioner of Wealth-tax of the assessee"s application u/s 18(2A) ?

3. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was justified in law in disposing of the appeals on merits of penalty

without referring them to the Appellate Assistant Commissioner for fresh disposal on merits ? "

4. The answers to the questions referred to this court depend upon the statutory provisions contained in the Act. The relevant statutory provisions, as they stood, with reference to the assessment years in question, are contained in Sections 18(1)(a), 18(2A) and 18(2B) of the Act. Section 18(1)(a), enables the WTO, AAC, Commissioner or Appellate Tribunal in the course of any proceedings under the Act to levy penalty, if an assessee has, without reasonable cause, failed to furnish the return which he is required to furnish under Sub-section (1) of Section 14. Section 18(2A) provides :

" Notwithstanding anything contained in Clause (i) or Clause (iii) of Sub-section (1), the Commissioner may, in his discretion--(i) reduce or waive the amount of minimum penalty imposable on a person under Clause (i) of Sub-section (1) for failure, without reasonable cause, to furnish the return of net wealth which such person was required to furnish under Sub-section (1) of Section 14..."

5. Section 18(2B) of the Act states :

" An order under Sub-section (2A) shall be final and shall not be called in question before any court of law or any other authority."

6. We have already referred to the fact that the assessee had filed a petition before the Addl. Commissioner of Income Tax on January 2, 1971, requesting him to waive the penalty in exercise of his powers u/s 18(2A) of the Act and the Commissioner passed an order on July 19, 1971. The Commissioner in his order points out that from the records of the case it was clear that the returns were filed voluntarily and in good faith prior to the issue of notice u/s 14(2) for the assessment years 1962-63 to 1967-68, that the wealth disclosed was full, that the assessee had co-operated with the department in the completion of the assessments and that the taxes have been paid. In view of this he reduced the minimum penalty leviable in respect of the assessment years with which we are concerned to 25% of the same. Having done that, in para. 6 of his order, he stated :

" The Wealth-tax Officer shall pass orders accordingly."

7. As pointed out already, the assessee was not aware of the passing of this order at that stage, because, admittedly, a copy of this order was not communicated to the assessee. On receipt of the order of the Commissioner, the WTO took proceedings for the levy and collection of the penalty in terms of the order of the Commissioner. On September 28, 1971, the WTO passed separate orders, practically in identical terms, in respect of each one of these assessment years. He referred to the application filed by the assessee before the Commissioner and the order passed by the Commissioner and stated :

" Even before the completion of assessment, the assessee has approached the Commissioner of Income Tax with a petition u/s 18(2A) for waiver of penalty. The

Commissioner in his letter C. No. 894 (133)/70 dated July 19, 1971, has directed me to levy a reduced penalty of Rs. 4,155 in the place of Rs. 16,610 (for the assessment year 1962-63) being the minimum penalty leviable. Hence, a penalty of Rs. 4,150 is levied."

8. As we pointed out already, when the assessee preferred appeals to the AAC against these orders of the WTO, the AAC took the View that the WTO did not pass these orders, but the orders were passed by the Commissioner u/s 18(2A) of the Act and those orders are final u/s 18(2B) of the Act. However, as we have already drawn attention to, the AAC had stated that the orders passed by the WTO were " in pursuance of the Commissioner's orders u/s 18(2A) of the Act ". Thus, it will be seen that even the AAC proceeded on the basis that there was an order of the Commissioner u/s 18(2A) of the Act and the WTO passed orders " in pursuance " of that order of the Commissioner. In such a context, the appeals preferred to the AAC being not against the orders passed by the Commissioner himself, but only against the orders passed by the WTO " in pursuance " of the order of the Commissioner, the AAC was wrong in holding that no appeals lay to him.

9. However, when the matter was taken up to the Tribunal, the Tribunal took the view that both in fact and in law, there was no order" of the Commissioner u/s 18(2A) of the Act and there was only the order of the WTO u/s 11(1)(a) of the Act. For the purpose of coming to the conclusion that there was no order of the Commissioner u/s 18(2A) of the Act, the Tribunal proceeded on the basis that the order of the Commissioner, to which we have already drawn attention, was not really an order, but was merely a confidential letter addressed by the Commissioner to the WTO. However, we are of the opinion that this view of the Tribunal is not correct. The Commissioner's order is styled as an " order " and he purports to exercise his powers u/s 18(2A) of the Act, and he did not send any confidential communication to the WTO. From the mere fact that a copy of the orders of the Commissioner dated July 19, 1971, was not communicated to the assessee and in para. 6 of the order of the Commissioner, the WTO was asked to pass orders according to the decision of the Commissioner, it could not be contended that what was passed on July 19, 1971, by the Commissioner was not an order u/s 18(2A), but only a confidential communication. Therefore, we are of the opinion that the Tribunal was wrong in coming to the conclusion that there was no order in fact passed by the Commissioner u/s 18(2A) of the Act.

10. However, we are of the opinion that the view of the Tribunal that there was no valid order in existence passed by the Commissioner is correct. As we mentioned already, the order of the Commissioner dated July 19, 1971, was not communicated to the assessee at all. In fact, the Tribunal points out in its order that it was not disputed before it that the order u/s 18(2A) by the Commissioner had not been communicated to the assessee.

11. Once this fact was not disputed, it is not disputed before us that such an order which was passed by an officer in exercise of his statutory powers but was

not communicated to the person to be affected by it, is not a valid order in law. Therefore, even though we differ from the conclusions of the Tribunal that the Commissioner did not pass an order u/s 18(2A) of the Act, we agree with the conclusions of the Tribunal that the order of the Commissioner passed on July 19, 1971, was not a valid order in law.

12. If there is no valid order of the Commissioner, the next question that arises for consideration is, what is the status of the order of the WTO dated September 28, 1971. If the Commissioner had merely directed the WTO to raise a demand and serve demand notice on the assessee for recovery of the penalties fixed by the Commissioner himself in his order, the position may be different because in such an event the WTO would be merely implementing administratively the order statutorily passed by the Commissioner u/s 18(2A) of the Act. In this case, what the WTO did was to pass an order as if it was an independent order imposing penalties in the amount fixed by the Commissioner himself on the assessee. In fact, the order passed by the WTO contains the following headings :

" Penalty, prosecution and composition--Sri M. K. S. Vanavarayar, Samathur Palace, Samathur Post, Pollachi Taluk--18(1)(a) Penalty--Levy of."

13. Thus, it is clear that even though the quantum of the penalty was in terms of the decision of the Commissioner, the WTO sought to exercise powers only u/s 18(1)(a) of the Act by way of levying the penalty.

14. Mr. J. Jayaraman, the learned counsel for the revenue, put forward two contentions before us. One was that the order of the Commissioner dated July 19, 1971, was communicated by the WTO by his orders dated September 28, 1971, and therefore the Tribunal was wrong in holding that the order of the Commissioner was not communicated to the assessee. Secondly, the learned counsel contended that even when the Commissioner passes an order u/s 18(2A) of the Act, it must be only with reference to Section 18(1)(a) of the Act and u/s 18(1)(a) it is only the WTO who could impose a penalty. We have no hesitation whatever in rejecting both these contentions. As far as the first contention is concerned, neither in form nor in substance, the communication of the WTO dated September 28, 1971, purports merely to be a communication of the order dated July 19, 1971, of the Commissioner. As a matter of fact, the order of the Commissioner dated July 19, 1971, was not communicated by the WTO to the assessee, his own communication dated September 28, 1971, being a forwarding or covering letter only. We have already referred to the fact that before the Tribunal it was not disputed that the alleged order u/s 18(2A) of the Act by the Commissioner has not been communicated to the assessee. In view of these features, there is absolutely no substance in the first contention.

15. As far as the second contention is concerned, we are of the opinion that in law it has no basis. We have referred to Section 18(1)(a) already and that section enumerates the officers who are competent to levy penalty and one such officer is the Commissioner himself. In addition to this, even Section 18(2A)

authorises the Commissioner in express terms to " reduce or waive the amount of minimum penalty imposable ", thereby making it clear that the Commissioner himself, as a matter of fact, it is the Commissioner alone, u/s 18(2A) who is competent to reduce or waive the amount of minimum penalty imposable. If the intention of the statute was that the Commissioner was merely to give a direction to the WTO and it was the WTO who should reduce or waive the penalty, the language of Section 18(2A) will be different. As the language now stands it is the Commissioner who is competent, in the exercise of his discretion, to reduce or waive the penalty and it is this power which the Commissioner purported to exercise in the present case ; but the order as such, which was indisputably a statutory order, was not communicated to the assessee. We must point out that the order affected the assessee, because he prayed for the waiver of the penalty, but the Commissioner did not grant that prayer and instead reduced the minimum penalty imposable and to that extent, the order of the Commissioner not being in accordance with the prayer of the assessee, the assessee can be legitimately stated to have grievance against the order of the Commissioner and, in such a context, the failure to communicate the order to the assessee would invalidate the order itself, as has been held by the Tribunal following the decision of the Supreme Court.

16. Consequently, we come to the conclusion that the order of the WTO dated September 28, 1971, had independent existence of its own and, therefore, an appeal against that order was competent and the Tribunal was justified in holding that the order of the Commissioner dated July 19, 1971, had no legal existence and that the only order which was operative was the order of the WTO dated September 28, 1971, against which an appeal lay.

17. Mr. J. Jayaraman then contended that if the Tribunal came to the conclusion that an appeal was available to the assessee and it had jurisdiction to deal with the appeal, the Tribunal should have immediately set aside the order of the WTO on the ground that it was beyond his jurisdiction and ought not to have gone into the merits of the order levying penalty. The basis for this argument was that without there being the order of the Commissioner u/s 18(2A) of the Act, the WTO will not have jurisdiction to levy a penalty less than the minimum penalty and in this case he having levied a penalty less than the minimum penalty, that order should have been set aside by the Tribunal as being without jurisdiction.

18. Here again, we are of the opinion that there is no substance in this contention. Appeals were preferred by the assessee and his grievance was that on merits no penalty should have been levied against him. It was not the assessee's case that the order of the WTO was vitiated because of want of jurisdiction. If the department wanted to take the point that if there was no valid order by the Commissioner u/s 18(2A) the order of the WTO was without jurisdiction, the department should have canvassed that question before the Tribunal and the department not having done so, it is not now open to the learned counsel for the revenue to agitate that question before us.

19. The learned counsel then contended that, in any case, the Tribunal ought not to have set aside the order of the WTO levying penalty, on merits. There was a two-fold argument in support of this contention. One was that the AAC having dismissed the appeals only on the ground that they were not maintainable, the Tribunal should have remanded the matter to the AAC for disposal on merits. The second was that there was no reasonable cause for not filing the returns in time and, therefore, the Tribunal was in error in setting aside the orders of penalty passed by the WTO. As far as the first point is concerned, it is purely one of discretion on the part of the Tribunal--whether it will dispose of the appeal on merits or remand the appeal to the AAC for disposal on merits. That will depend upon the circumstance whether necessary facts for disposal of the appeal on merits were available before the Tribunal or not. If, in a particular case, the Tribunal, on the basis of the materials already available, considers that it could satisfactorily dispose of the appeal on merits, it cannot be contended that as a matter of law the Tribunal ought not to have allowed the appeals and remanded the matter to the AAC for disposal on merits.

20. As far as the second aspect is concerned, this is what the Tribunal says in support of its conclusion that there was reasonable cause for the assessee for not filing the returns in time :

".....the Appellant (the assessee) who has all along been an agriculturist, periodically effected distress sales of lands due to tenancy legislation and uncertain economic conditions. The appellant was receiving only nominal amounts in pursuance of the sale deeds and substantial part of the sale consideration remained outstanding. The outstanding amounts were made as a charge on the agricultural lands with all the rights of the unpaid vendor's lien. The appellant was under the bona fide belief that the balance of sale consideration did not constitute wealth so as to be liable to tax under the Wealth-tax Act. After taking competent legal advice, he came to know that all the outstanding amounts on the sale of lands constitute wealth and they are liable to wealth-tax. Thereafter, he voluntarily filed wealth-tax returns on December 14, 1970, for assessment years 1962-63 to 1967-68."

21. This finding of the Tribunal is sufficient to answer the point raised by learned counsel for the revenue before us. In fact, the third question in T. C. No. 394 of 1974, having regard to the form in which it has been referred to the court, will not admit of any further contention on the part of the learned counsel for the revenue as to the correctness or otherwise of the conclusions of the Tribunal in this behalf.

22. Under these circumstances, we answer all the questions raised in these references except question No. 2 in T. C. Nos. 1427 to 1432 of 1977 in the affirmative and in favour of the assessee. As far as the second question in Tax Cases Nos. 1427 to 1432 of 1977 is concerned, a reading of the order of the Tribunal will show that no such contention was put forward before the Tribunal and, therefore, the question does not arise out of the order of the Tribunal. The

assessee will be entitled to his costs of these references. Counsel's fee Rs. 500, one set.