

(1981) 01 BOM CK 0021

In the Bombay High Court

Case No : Wealth-tax Reference No. 177 of 1976

Commissioner of Wealth-tax

APPELLANT

Vs

Shrikant Ramnarayan Mor

RESPONDENT

Date of Decision : 07-01-1981

Acts Referred:

Income Tax Act, 1961 — Section 271(1)

Wealth Tax Act, 1957 — Section 14, 14(1), 14(2), 16, 16(5)

Citation : (1981) 23 CTR 111 : (1984) 147 ITR 412

Hon'ble Judges : M.N. Chandurkar, J; M.H. Mohta, J

Bench : Division Bench

Judgement

Chandurkar, J.—The assessee was assessed to wealth-tax for the assessment year 1966-67. Though the assessee ought to have filed a return by June 30, 1966, he did not file any return under s. 14(1) of the W.T. Act, 1957, in spite of time being granted to him from time to time up to August 31, 1966. A notice under s. 17 with s. 14(2) of the Act was served on the assessee on December 15, 1970, and an assessment order under s. 16(5) was made on December 27, 1971 (sic).

2. A notice to show cause why penalty should not be imposed under s. 18(1)(a) of the Act was issued on February 27, 1971. It may be pointed out that the material part of s. 18 which dealt with penalty as it was in force w. e. f. April 1, 1965, having been so introduced by s. 18 of the W. T. (Amend.) Act, 1964, read as follows :

"18. Concealment of assets, etc. (1). - If the WTO, AAC or Appellate Tribunal in the course of any proceedings under this Act is satisfied that any person -

(a) has without reasonable cause failed to furnish the return which he is required to furnish under sub-s. (1) of s. 14 or by notice given under sub-s. (2) of s. 14 or s. 17, or has without reasonable cause failed to furnish it within the time allowed and in the manner required by sub-s. (1) of s. 14 or by such notice, as the case may be -.....

he or it may, by order in writing, direct that such person shall pay by way of penalty -

i) in the cases referred to in clause (a) in addition to the amount of wealth-tax, if any, payable by him, a sum equal to two per cent, of the tax for every month during which the default continued, but not exceeding in the aggregate fifty per cent. of the tax;....."

Clause (i) in s. 18(1) as it stands today is in force since April 1, 1976, but at the time when the order of penalty was passed, the relevant provision as introduced by s. 24 of the Finance Act, 1969, in place of the original cl. (i) and cl. (ii) with the Explanation read as follows :

"(i) in the case referred to in clause (a), in addition to the amount of wealth-tax, if any, payable by him, a sum, for every month during which the default continued, equal to one-half per cent. of -

(A) the net wealth assessed under s. 16 as reduced by the amount of net wealth, on which, in accordance with the rates of wealth-tax specified in Paragraph A of Part I of the Schedule or Part II of the Schedule, the wealth-tax chargeable is nil, or

(B) the net wealth assessed under s. 14, where assessment has been made under that section, as reduced by -

(1) the net wealth, if any, assessed previously under s. 16 or s. 17 or

(2) the amount of net wealth on which, in accordance with the rates of wealth-tax specified in Paragraph A of Part I of the Schedule or Part II of the Schedule, the wealth-tax chargeable is nil, whichever is greater, but not exceeding, in the aggregate, an amount equal to the net wealth assessed under s. 16, or, as the case may be, the net wealth assessed under s. 17, as reduced in either case in the manner aforesaid."

3. The WTO imposed penalty of Rs. 11,813 which was computed as follows :

(i) Penalty at 2% of the tax payable by the assessee for the period of default of 25 months up to September 30, 1968.

(ii) Penalty at 1/2% of the net wealth for the period of default from April 1, 1969, onwards.

4. The WTO did not compute any amount by way of penalty for the period October 1, 1968, to March 31, 1969. In appeal, the AAC held that the maximum penalty imposable at 50% of the tax having been already imposed by the WTO at the rate of 2% of the tax for delay of each month, it was not open to the WTO to impose penalty once again on the footing that the assessee was a defaulter after April 1, 1969, by applying the amended provision of s. 18(1)(a)(i). It may be pointed out here that 25 months of default ended on September 30, 1968. The AAC reduced the amount of penalty to Rs. 263. The Department filed an appeal

before the Tribunal and the Tribunal took the view that the penalty had to be determined in accordance with the law as it stood on the date on which the default occurred. The Tribunal found that the default had occurred before April 1, 1969, and the penalty, therefore, had to be determined in accordance with the provisions of s. 18(1)(a)(i) as it then stood, and the amended provisions were not attracted.

5. Before the Tribunal a contention was also raised on behalf of the assessee that the notice which was issued under s. 14(1)/14(2)/17 was ambiguous in so far as it did not clearly bring out "the charge which the assessee was facing" and, therefore, the assessee was not afforded a reasonable opportunity of being heard before the penalty was imposed. The Tribunal, however, declined to express any opinion on this contention raised on behalf of the assessee.

6. Aggrieved by the view which the Tribunal took including the applicability of the amended provisions of s. 18(1)(a) of the W.T. Act, the Department and the assessee applied for a reference of the relevant questions and accordingly the following questions have been referred by the Tribunal under s. 27(1) of the W.T. Act :

"(1) Whether, on the facts and in the circumstances of the case, the penalty imposable on the assessee for the delay in filing the return is to be determined in accordance with the provisions of s. 18(1)(a)(i) as they stood on the date on which the return of wealth was due to be filed ?

(2) Whether, on the facts and in the circumstances of the case in determining the amount of penalty under s. 18(1)(a)(i), the amendment to the said section which was enacted w.e.f. April 1, 1969, is applicable ?

(3) Whether, on the facts and in the circumstances of the case, the delay in filing the return in accordance with the provisions of s. 14(1) is reduced because of the service of a notice under s. 17 read with s. 14(2) on the assessee ?"

7. At the instance of the assessee :

"(4) Whether, on the facts and in the circumstances of the case, the assessee was immune from penalty under s. 18(1)(a) in respect of "the period exceeding the period of 25 months from the date of default when the said period of 25 months expired before s. 18(1)(a)(i) was amended w.e.f. April, 1, 1969 ?

(5) Whether, on the facts and in the circumstances of the case, and having regard to the terms of the show-cause notice issued by the WTO to the assessee, the order imposing penalty was illegal ?"

8. It may be stated at this stage that the learned counsel for the assessee did not press these questions and the questions are, therefore, not answered.

9. Now, so far as the questions which are referred at the instance of the revenue are concerned, Shri Joshi has fairly brought to the notice the conflict of views with regard to the applicability of the amended provisions of s. 18(1)(a)(i) of the

W.T. Act in a case where the assessee has failed to file the wealth-tax return as required by s. 14(1) before the amendment of s. 18(1)(a)(i) w.e.f. April 1, 1969. There is no dispute that the penalty provided for by the amended provision is more onerous than the penalty which was originally provided for by the provisions of s. 18(1)(a)(i) which was introduced by the W.T. (Amendment) Act, 1964, w.e.f. April 1, 1965. The decision of the first question, therefore, turns on whether we are able to accept the contention raised on behalf of the Revenue that in a case where the failure to furnish the necessary return occurred prior to April 1, 1969, in so far as the default continued after April 1, 1969, is concerned, the quantum of penalty must be determined on the basis of the amended provisions w.e.f. April 1, 1969. Shri Joshi did not dispute, and indeed rightly, so that in so far as the period till March 31, 1969, is concerned, the quantum of penalty will have to be determined in accordance with the original provision in s. 18(1)(a)(i), which provided that in a case of failure to furnish the necessary return, the penalty payable by the assessee would be a sum equal to 2 per cent. of the tax for every month during which the default continued but not exceeding in the aggregate 50 per cent. of the tax. The argument of the learned counsel for the Revenue is the when an assessee fails to file a return, though it may be correct that the default takes place on the date on which the return was required to be filed, the default is a continuing default and if such continuing default continues after April 1, 1969, also, the amended provisions of s. 18(1)(a)(i) will fasten themselves on such a defaulter. Therefore, according to the learned counsel, after April 1, 1969, the penalty will have to be computed in accordance with the provisions in force as and after April 1, 1969, till the date on which return is filed, or where the return has not been filed, till the assessment has been made.

10. The learned counsel has found support for this argument in a decision of the Kerala High Court in Commissioner of Wealth-tax Vs. Smt. V. Pathummabi, In that case the Kerala High Court has taken the view that where there is an omission of file the returns for the years 1964-65 and 1965-66 and the returns were furnished on March 30, 1970, the penalty would be imposed under s. 18(1)(a)(i) as it stood prior to the amendment by the W.T. (Amend.) Act, 1964, for the assessment year 1964-65 and for the assessment year 1965-66, the amended provisions which came into force w.e.f. April 1, 1965, would have to be applied. The learned judges have taken the view that reading s. 18(1)(a)(i) as amended when read along with the main s. 18(1) showed that an offence that, had become complete had been changed into a continuing offence visited with consequences every month for continued default even by the W.T. (Amend.) Act, 1964. The Division Bench has taken the view that if the original default, namely, the failure to file the return within the date stipulated under the Act had occurred before April 1, 1965, i.e., the date from which the amendment introduced in s. 18 by the W.T. (Amend.) Act, 1964, came into operation, s. 18(1)(a)(i), as amended, had no application in determining the question of penalty to be imposed. The Division Bench further took the view that the amendment should

be understood in introducing a different form of offence which is treated as repeating itself after the original default during every month of its continuance, and that this was new law introducing a new type of offence and applied to an offence committed after the amended s. 18(1)(a)(i) (amended by the W.T. (Amend.) Act, 1964), came into force. Relying on this decision, Shri Joshi has contended that the continuous failure of the assessee to file a return after April 1, 1969, must be treated as a continuing default, and if the continuing default occurred after April 1, 1969, the provisions of penalty in force at that time could be the only appropriate provisions which would be material for the purpose of imposing penalty. There is no doubt that the Kerala High Court has taken the view which supports the contention of Shri Joshi. But it appears that this decision is the only discordant note so far as the construction of the amended provisions of s. 18(1)(a)(i) are concerned, as they have been construed by other High Court. But before we go to the decisions which take the view contrary to the view of the Kerala High Court, we would deal with the matter on first principles.

11. The contention raised on behalf of the Revenue necessitates primarily a consideration of the question as to whether a default committed by an assessee by his failure to file a return within the prescribed period can really be called a continuing default. It is not necessary for us to deal with the question as to whether for the purpose of s. 18(1)(a)(i) also such default must be treated as an offence or not as some of the decisions seem to have done. But we would rather adopt the terminology utilised by Parliament itself in s. 18(1)(a) and s. 18(1)(a)(i). Section 18(1)(a) which is reproduced earlier and in which the amendment has not brought about any change along with cls. (b) and (c) of s. 18(1), refers to certain kinds of omissions which would attract penalty. The penalties themselves have been specified in cls. (i), (ii) and (iii) of the same section. We are concerned in this case only with the penalty which is attracted in the case of a failure to furnish the return which the assessee is required to furnish under s. 14(1) or by notices given under sub-s. (2) of s. 14 or s. 17 without reasonable cause. Whether there was a reasonable cause or not is not material for the decision of the question referred. Now, as we come to the penalty provision in cl. (i), the penalty provided is "a sum equal to 2 per cent. of the tax for every month during which the default continued but not exceeding in the aggregate fifty per cent. of the tax ?". The provision puts a ceiling on the penalty at 50 per cent. of the tax, and this penalty is in addition to the amount of wealth-tax. An important feature of the penalty provision is that it contemplates a penalty to be levied for the entire period during which "the default continued". The contention of Shri Joshi appears to be that when the penalty refers to the words "the default continued", it means that the default is treated as a continuing default by Parliament inasmuch as for each month during which the default has continued, the penalty has to be levied. Now, it is obvious that the default referred to in cl. (i) of s. 18(1)(a). It is this failure which is described as a default, and this failure to file the return continues till the return is filed or till the assessment order is made. There is a known distinction between a wrong which continues and a

continuing wrong. Continuing wrong is a wrong which is of a recurring nature. But where a wrong has been done once and has resulted in an injury or harm, the mere fact that the injury continues is no justification for holding that the wrong itself is a continuing wrong. The statutory obligation placed on the assessee by the provisions of s. 14 is to file a return. Once the prescribed date for filing the return has passed without the assessee filing the return, there is an omission on the part of the assessee to comply with the statutory provision. This omission can occur only once because the statute prescribes a particular date before which the return has to be filed. Once this omission has occurred the assessee has committed a default. There cannot be a second default with regard to the filing of the return for the same assessment year because the return can be filed only once and there is only one date for the filing of the return. The concept of continuing default is, therefore, foreign to the statutory requirement that a particular thing has to be done by a particular time. The concept of continuing offence or continuing breach fell for the consideration of this court in *State Vs. A.H. Bhiwandiwalla*, In that case an occupier of a salt factory was called upon to comply with the requirements of the Factories Act by the Inspector of Factories when he visited the factory on March 10, 1952. When the Inspector visited the factory again on May 23, 1953, he found that the accused had taken no steps to comply with the requisition. A prosecution under the Factories Act has to be instituted within a specific period provided by s. 106 of the Factories Act. In that case, the relevant period was three months. The accused was prosecuted within three months from May 20, 1953, which was obviously beyond three months from March 10, 1952, for having failed to apply for registration in the prescribed form and also for failure to give a written notice of occupation as required by s. 7(1). The contention on behalf of the State there was that the failure of the accused to apply for registration and to give a notice of occupation was a continuing offence and, therefore, the prosecution filed within three months from May 20, 1953, could not be said to be beyond limitation. While holding that the failure of the accused to apply for registration as well as for grant of licence were punishable within the meaning of s. 92 of the Factories Act, the Division Bench held that these omissions did not constitute a continuing offence and, therefore, the prosecution in respect thereof filed more than three months was barred by limitation u/s 106. In that context, dealing with expression "continuing offence", the Division Bench observed.

"this expression ("continuing offence"), has acquired a well-recognised meaning in criminal law. If an act committed by an accused person constitutes an offence and if that act continues from day to day, then from day to day fresh offence is committed by the accused so long as the act continues. Normally and in the ordinary course, an offence is committed only once. But we may have offences which can be committed from day to day and it is the offence falling in this latter category that are described as continuing offences."

12. We may also usefully refer to the decision of the Supreme Court in *Balkrishna Savalram Pujari and Others Vs. Shree Dnyaneshwar Maharaj Sansthan and*

Others, , where the Supreme Court, while dealing with the concept of continuing wrong, referred to in s. 23 of the Limitation Act, 1908, observed at page 807 :

"It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by itself continues, then the act constitutes a continuing wrong. In this connection, it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury."

13. In *State of Bihar Vs. Deokaran Nenshi and Another*, , the Supreme Court was dealing with a complaint for failure to furnish a return by the prescribed date as required by s 66 of the Mines Act, 1962, and dealing with the distinction between an offence which takes place when an act or omission is committed once and for all and a continuing offence, the Supreme Court observed :

"Continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs and reoccurs there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues and, therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all."

14. In the light of the above observation for the Supreme Court, the proper test to decide whether the failure to furnish a return as required by s. 14(1) or 14(2) is a continuing default as contended on behalf of the Revenue is to ascertain whether the default occurs once and for all or whether there is a recurring default. There is a clear indication in cl. (a) of s. 18(1) that there is only one failure which occurs by the failure to file a return. There will, therefore, be only one default in the case where the assessee fails to file the return as required by the provisions of s. 14(1) and 14(2). It would not, therefore, be permissible to treat the failure contemplated by s. 18(1)(a) as a continuing failure and there will be no justification for equating the words "the default continued" with "continuing default".

15. The provision providing for the penalty being computed with reference to the period during which the default continues has relevance only for determining the quantum of penalty and it does not have the effect of treating the default as a continuing default. It appears from the decision of the Kerala High Court that the

amendment made in cl. (i) of s. 18(1)(a) by relating the penalty with reference to the period during which the default continues has been understood by the learned judges as "introducing a different form of offence which is treated as repeating itself after the original default during every month of its continuance." It may be pointed out that the penalty provision in cl. (i) originally, prior to its amendment from April 1, 1965, merely provided for levy of penalty which was to be "a sum not exceeding one and a half times the amount of such tax" which was in addition to the amount of wealth-tax. By the amendment w.e.f. April 1, 1965, the penalty was to be "a sum equal to 2 per cent. of the tax for every month during which the default continued". It was with reference to this amendment that the Kerala High Court made the observation as follows at page 694 :

"... We understand the amendment as introducing a different form of offence which is treated as repeating itself after the original default during every month of its continuance. This is a new law introducing a new type of offence and must apply only to an offence committed after the amended s. 18(1)(i) (amended by Act 46 of 1964) came into force.

16. As we have already pointed out above, we are unable to treat either the original provision as amended w.e.f. April 1, 1965, or the provision as amended with effect from April 1, 1969, as contemplating the failure to furnish a return within the meanings of s. 18(1)(a) as a continuing default.

17. Once we hold that the assessee cannot be treated committing a continuing default, then the next question is : which is the provision relating to levy of penalty which will apply. Normally, in the case of penalty or punishment, the provision as in force at the time when the default has occurred or the penalty was attracted will be the provision which will determine the quantum of penalty. We need only refer to the decision of the Supreme Court in *Brij Mohan Vs. Commissioner of Income Tax , New Delhi*, That was no doubt a case which dealt with the question relating to penalty for concealment of income under s. 271(1) (c) of the I.T. Act, 1961. The return in that case was filed on April 24, 1968, for the assessment year 1964-65. The argument in the matter of penalty for concealment under s. 271(1)(c) read with s. 271(1)(iii) was that the penalty provision as it stood in the assessment year 1964-65 should be applied and not one as stood in the amended form in 1968, which was of a more onerous character. Repelling the argument, the Supreme Court observed as follows :

"We are unable to accept the contention. In our opinion, opinion, the assessment of the "total income" and the computation of tax liability is a proceeding which, for the purpose, is governed by entirely different considerations from a proceeding for penalty imposed for concealment of income. And this is so notwithstanding that the income concealed is the income assessed to tax. In the case of assessment of income and the determination of the consequent tax liability, the relevant law is the law which rules during the assessment year in respect of which the total income is assessed and the tax liability is determined. The rate of tax is determined by the relevant Finance Act. In the case of a

penalty, however, we must remember that penalty is imposed on account of the commission of a wrongful act and plainly it is the law operation on the date on which the wrongful act is committed which determines the penalty. Where penalty is imposed for concealment of particulars of income, it is the law ruling on the date when the act of concealment takes place which is relevant. It is wholly immaterial that the income concealed was to be assessed in relation to an assessment year in the past."

18. The observations of the Supreme Court underlined above are clear authority for the proposition that the provision relating to penalty to be given effect to must be the one which is operative at the time when the act or omission which attracts penalty has taken place. There is a direct decision of the Allahabad High Court with regard to s. 18 of the W.T. Act in *Commissioner of Wealth-tax Vs. Chunni Lal Anand*, , in which a Division Bench of that court has taken the view that for the purpose of levy of penalty for delay in submitting the return, the law as it stood on that date would be applicable and not the law as on the date of the beginning of the assessment year which, in that case on April 1, 1968 or on the date on which the return was actually filed.

19. We find that the view which we have taken is supported by a series of decisions of other High Courts. In *Commissioner of Wealth-tax Vs. R.D. Chand and V.R. Desai*, a Division Bench of Andhra Pradesh High Court took the view that the words "default continued" used in s. 18(1)(a)(i) do not connote that the offence under s. 18(1)(a) of the Act is a continuing one, and that when the enactment does not provide expressly or by necessary implication for import of the concept of continuing offence, it is not proper to import the said concept into the section, merely because the said concept is fairly settled in criminal jurisprudence. The Division Bench also held that for the purpose of levy of penalty, the law that is applicable is the law as it stood on the date when the default was committed by the assessee and not as it stands on the date when the officer forms his opinion about the default by the assessee. Referring to s. 18(1)(a) of the W.T. Act the Division Bench pointed out that the default under s. 18(1)(a) must be deemed to have been committed by the assessee on the due date on which he was required to file a return for the relevant assessment year and will be visited with the penalty under the provisions of the Act as it stood on the said crucial date.

20. In *T. K. ROY Vs. COMMISSIONER OF WEALTH-TAX. S. KARAM SINGH v. COMMISSIONER OF WEALTH-TAX S. N. ROY v. COMMISSIONER OF WEALTH-TAX.*, there was difference of opinion between the two learned judges of the Assam High Court on the question of the applicability of the provisions of s. 18(1)(a)(i) as amended w.e.f. April 1, 1969. *Baharul Islam J.* (as he then was) had taken the view that, on the facts of the case before that court, the calculation of penalty up to March 31, 1965 had to be made under s. 18(1)(a)(i) of the W.T. Act, as it originally stood, and for the period April 1, 1965, to March 31, 1969, according to s. 18(1)(a)(i) as substituted w.e.f. April 1, 1965, and for the period thereafter s.

18(1)(a)(i) as substituted w.e.f. April 1, 1969. The other matter, therefore, went to the third Judge who did not agree with Baharul Islam J., and the majority opinion was that the omission without reasonable cause to file a return on the due date by the assessee completes his default once and for all as on that date and does not render it a continuing default. Consequently, it was held that the penalty could be imposed on the assessee only on the basis of the law as it stood on that date and that law will be applicable for the entire period of the default. The Karnataka High Court has also taken a similar view in Commissioner of Wealth Tax, Mysore Vs. C.S. Manvi and Others, . The Division Bench held that the amendment made in 1969 to s. 18(1)(a) by the Finance Act, 1969, is not with retrospective effect and cannot in any way affect the liability which got crystallised earlier to its coming into force. The Decision Bench earlier held that "the penalty gets crystallised as on the expiry of the last date of the period within which the return was due to be filed and the default occurred."

21. A similar view is also taken by the Madhya Pradesh High Court in Addl. Commissioner of Wealth Tax Vs. Smt. Manjuladevi Muchhal, The defaults in that case were in not filing the returns due on June 30, 1961, June 30, 1962 and June 30, 1963. The returns were filed on November 18, 1969 and the Division Bench held that the law for the Purpose of penalty that would be applicable would be the law in force in those dates and not the law which had been brought into force on April 1, 1969.

22. In the view which we have taken, the questions referred are answered as follows :

Question No 1 : In the affirmative and against the Revenue.

Question No 2 : In the negative and against the Revenue.

Question No 3 : Not necessary to be answered.

Question No 4 : Not pressed by the assessee and hence not answered.

23. The assessee to get the costs of this Reference.