

(1982) 04 AHC CK 0058

In the Allahabad High Court

Case No : Wealth-tax Reference No. 698 of 1977

Commissioner of Wealth-tax

APPELLANT

Vs

Umrao Lal

RESPONDENT

Date of Decision : 09-04-1982

Acts Referred:

Income Tax Act, 1961 — Section 129

Wealth Tax Act, 1957 — Section 18(1), 18(2), 39

Citation : (1982) 30 CTR 269 : (1982) 136 ITR 49 : (1982) 11 TAXMAN 41

Hon'ble Judges : R.R. Rastogi, J;K.N. Seth, J

Bench : Division Bench

Advocate : M. Katju, for the Appellant; R.R. Agrawal and Bharatji Agrawal, for the Respondent

Final Decision : Disposed Of

Judgement

R.R. Rastogi, J.—This is a reference u/s 27(1) of the W.T. Act, 1957, hereafter referred to as "the Act". For the assessment years 1970-71 and 1971-72, the assessee, Sri Umrao Lal, an individual, should have filed the returns of his net wealth by 30th June, 1970, and 30th June, 1971, respectively. He, however, filed them on April 17, 1971, and December 7, 1972, for these two years, respectively. The WTO made the assessment and for the delay that had occurred in the filing of the returns took action u/s 18(l)(a) of the Act. The notices were duly served on the assessee on September 2, 1972. The assessee did not appear on the date fixed nor did he file any written explanation. It appears that some time during the pendency of the proceedings, the officer, who had initiated the same, was transferred and was succeeded by another officer. The successor officer passed penalty orders for both these years on September 14, 1973. He took the view that in spite of service of notice the assessee had not appeared on the date fixed nor he had filed any written explanation and, thus, he had nothing to say in his defence. In the result, he imposed penalties in the sums of Rs. 11,125 and Rs. 5,370 for these two years, respectively.

2. The assessee appealed and contended before the AAC that he had not been given any opportunity of a hearing by the WTO before imposing the penalty and, hence, the orders passed by him were bad. This submission found favour with the AAC and he cancelled the penalty orders and allowed the appeals. Aggrieved, the department took up the matter in appeal before the Appellate Tribunal.

3. The Appellate Tribunal took up the appeals for both these years together. The contention urged on behalf of the Department was that the notices had been served properly and the assessee had not put in any appearance on the date fixed and hence the view taken by the AAC was not justified. It was, on the contrary, contended on behalf of the assessee that the penalty order was passed about a year after the service of notice and in the meantime the officer had also changed and hence it was the duty of the successor officer to issue a notice to the assessee and afford him a fresh opportunity of a hearing. The Appellate Tribunal accepted this contention and observed :

" After hearing both the parties, we are of the view that the order of the Appellate Assistant Commissioner is justified. When there is a change in the incumbent of the office, the principles of natural justice demand that another opportunity should be given by the new officer to the assessee and non-providing of such an opportunity has resulted in violation of the principles of natural justice. Apart from that when an assessee is being subjected to a penalty, a further opportunity, if provided, would have obviated a lot of hardship. After all justice must be tempered with mercy and there should be no element of arbitrariness in imposing penalty, and providing an opportunity to the assessee before imposing the penalty is the first desirable course which should be adopted by the Income Tax Officer-- Ram Saran Dass Kapur Vs. Commissioner of Income Tax, Patella, ; Calcutta Tanneries (1944) Ltd., Calcutta Vs. Commissioner of Income Tax, Calcutta, and SATPRAKASH RAM NARANJAN Vs. COMMISSIONER OF Income Tax.,

4. In the result, the Tribunal dismissed both the appeals. Now, at the instance of the Commissioner, the following questions" of law . has been referred for the opinion of this court:

"Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was correct in deleting the penalties of Rs. 11,125 for the assessment year 1970-71 and of Rs. 5,370 for the assessment year 1971-72 imposed u/s 18(1)(a) of the Wealth-tax Act ?"

5. Since the Appellate Tribunal, in arriving at its view, that if during the pendency of proceedings under the Act the officer conducting the same is transferred the principles of natural justice require that another opportunity should be given by the successor officer to the assessee, appears to have had in its mind Section 39 of the Act, we think it proper to reframe the question referred with a view to bring out and to consider the controversy involved in its proper perspective. We, therefore, reframe the question as under:

"(a) Whether, on the facts and in the circumstances of the case, the successor officer was under an obligation to give a notice u/s 39 of the Act to the assessee before continuing and concluding the proceedings concerned ?

(b) Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was correct in deleting the penalties of Rs. 11,125 for the assessment year 1970-71 and of Rs. 5,370 for the assessment year 1971-72 imposed u/s 18(l)(a) of the Wealth-tax Act?"

6. So far as the merits of the case are concerned, admittedly the assessee had been served with the show-cause notice on September 2, 1972. He did not appear on the date fixed nor did he file any explanation whatsoever. That being so, we do not find any basis for the observation made by the Appellate Tribunal I

"Apart from that when an assessee is being subjected to a penalty, a further opportunity, if provided, would have obviated a lot of hardship."

7. It is not possible to say what "hardship" the Tribunal had in its contemplation when making this observation. Similarly, though it may be correct to say that justice should be tempered with mercy and there should be no element of arbitrariness in imposing penalty and providing an opportunity to the assessee before imposing the penalty is the first desirable course, there was nothing on the record to suggest that the assessee had not been given an opportunity of being heard as required by the relevant provision.

8. Section 18(1) of the Act has made provision for the imposition of penalty for failure to furnish returns, to comply with notices or concealment of assets, etc. So far as failure to furnish returns is concerned, before taking any action for such default the WTO, AAC, Commissioner or Appellate Tribunal, in the course of any proceedings under the Act, is to be satisfied that any person "has without reasonable cause failed to furnish the returns which he is required to furnish..." Sub-section (2) of this section reads:

1 "No order shall be made under Sub-section (1) unless the person concerned has been given a reasonable opportunity of being heard."

9. It would appear, therefore, that it is mandatory on the authority to give a reasonable opportunity to the assessee of being heard before making an order imposing any such penalty. The sub-section contemplates an enquiry before the imposition of a penalty. The enquiry must be fair and judicial and penalty cannot be imposed unless the assessee has been heard or has been given a reasonable opportunity of being heard. Now, what is meant by "reasonable cause" and is it for the Department to establish that the assessee was prevented by reasonable cause in furnishing the return within the time required ? In our opinion, what is required is that before imposing a penalty for a failure on the part of an assessee to furnish the return within the time required, the officer must be satisfied that the assessee had without reasonable cause failed to furnish the return. This satisfaction should be an objective satisfaction to be arrived at on a consideration

of the facts and circumstances of the case. In other words, unless the assessee offers an explanation, the officer is not in a position to decide as to whether or not the cause offered is reasonable. After all, it is not for the officer to make out a cause for a defaulting assessee and then consider its reasonableness or otherwise. Thus, the essential requirements of this provision are that on receipt of a show-cause notice the assessee has to offer an explanation orally or in writing because it is he alone who can say what the reason was which prevented him from complying with this requirement. The officer is then required to consider it in a fair and judicial manner and to decide as to whether the cause shown is reasonable or not. Penalty can be imposed only when the officer finds that there was no reasonable cause which prevented the assessee from furnishing the return in time. It may be noted that the import of the element of mens rea to a case-falling u/s 18(l)(a) is not called for. We may refer in this behalf to a Full Bench decision of the Kerala High Court in Commissioner of Income Tax Vs. Gujarat Travancore Agency, . A Pull Bench of the Orissa High Court also in Commissioner of Income Tax Vs. Gangaram Chapolia, took the same view that the burden of proof of reasonable cause u/s 271(l)(a) of the I.T. Act, 1961, is on the assessee, as the matter is within his special knowledge, The provision contained in Section 18(l)(a) is in pari materia with that stated in Section 271(l)(a) of the I.T. Act and in our opinion the same principle would apply to a case falling under this provision. It is correct that this burden can be discharged by preponderance of probabilities as in a civil case and not necessarily by proof beyond reasonable doubt. In other words, unless the assessee comes forward with an explanation to explain the delay, its reasonableness or otherwise cannot be judged by the officer. In the instant case, the assessee had not put in an appearance at all on receipt of the show-cause notice, what to say of filing any explanation in writing.

10. The question that now arises is as to what is the effect of transfer of authorities on pending proceedings. Section 39 of the Act reads :

"Whenever in respect of any proceeding under this Act any wealth-tax authority ceases to exercise jurisdiction and is succeeded by another who has and exercises such jurisdiction, the authority so succeeding may continue the proceeding from the stage at which the proceeding was left by his predecessor:

Provided that the assessee concerned may demand that before the proceeding is so continued the previous proceeding or any part thereof be reopened or that before any order of assessment is passed against him, he be reheard."

11. Section 129 of the I.T. Act is exactly in the same words except for the difference that instead of "Wealth-tax Authority", "income tax Authority" is mentioned therein. In the 1922 Act as well, there was the same provision contained in Section 5(7C) except for the difference that there were two provisos to that section. The second proviso provided for an exclusion of the time taken in reopening the proceeding or in re-hearing the assessee, in computing the period for the purposes of Sub-section (3) of Section 39. We are not concerned with this

aspect in the present case.

12. It would be seen that what Section 39 of the W.T. Act or Section 129 of the I.T. Act requires is that whenever during the pendency of any proceeding an I.T. Authority or a W.T. Authority, as the case may be, is succeeded by another, the successor "may" continue the proceedings from the stage at which the proceeding was left by his predecessor. The assessee has, however, been given a right to demand that before the proceeding is so continued, the previous proceeding or any part thereof should be reopened, for example, a witness should be examined afresh and, secondly, that the assessee should be reheard before an order of assessment is passed against him. To enable the assessee to exercise this right is it implicit in the section that the succeeding authority should intimate to the assessee his intention to continue the proceeding from the stage at which it was left by his predecessor ?

13. It was urged by the learned standing counsel that the view taken by the Appellate Tribunal was erroneous that it is incumbent on the succeeding authority to give another opportunity to the assessee and in case he fails to do so, it amounts to a breach of the principles of natural justice. In support of this contention, our attention has been invited to a number of decisions. On the contrary, on behalf of the assessee, it was submitted that the view taken by the Tribunal was perfectly legal and justified and reliance was placed on two decisions of the Andhra Pradesh High Court : *Anantha Naganna Chetty Vs. The Commissioner of Income Tax, Andhra Pradesh, Hyderabad*, and *Commissioner of Wealth-tax Vs. Smt. Azizunnissa Begum*, .

14. After carefully considering the submissions and going through the cases cited before us, we are of the opinion that the view taken by the Appellate Tribunal on the facts of the instant case was erroneous in law. We do not subscribe to the view that in all cases it is implicit in Section 39 that the succeeding authority should intimate to the assessee his intention to continue the proceeding from the stage at which it was left by his predecessor. In some cases such intimation would certainly be required. For instance if pursuant to a notice the assessee submitted his explanation and in order to support the cause alleged therein for the delay, has to file some evidence, then certainly if during the pendency of such proceedings the officer conducting the same is transferred, then the succeeding officer should give a notice to the assessee before continuing the proceedings. There may be another case where the recording of evidence is going on and has not concluded when a change takes place in the incumbent of the office. Yet another instance may be cited where along with his explanation the assessee has prayed for an opportunity to make his submissions orally. However, in a case where the assessee has merely filed an explanation, the same can very well be taken into consideration by the succeeding authority without giving any fresh opportunity to the assessee of being heard. The present case stands on a still weaker footing because on receipt of notice the assessee had not put in appearance nor had filed any written explanation. That being so, the

succeeding authority was not required under the relevant provision to afford him another opportunity of hearing.

15. We may now refer to the cases cited before us and those which have been referred to by the Appellate Tribunal. In *Calcutta Tanneries (1944) Ltd., Calcutta Vs. Commissioner of Income Tax, Calcutta*, which was a case u/s 28(1)(c) of the Indian I.T. Act, 1922, the hearing of the proceedings was concluded on September 29, 1951, and a long time thereafter a successor officer passed an order on January 14, 1954, imposing a penalty, without giving an opportunity to the assessee to be heard. The view taken by the court was that the combined effect of Section 5(7C) and Section 28(3) was to authorise the succeeding ITO to pass an order upon the evidence produced before his predecessor-in-office. As a result of the assessee's failure to exercise its right under the first part of the proviso to Section 28(3) it had lost its right to have the proceedings reopened but it did not lose its rights of being heard u/s 28(3) before the officer who had been invested with the jurisdiction to continue the penalty proceedings. The successor officer had no authority to pass an order of penalty without giving the assessee a further opportunity of advancing arguments before him. This decision has been explained by the Calcutta High Court itself in *Kanailal Gatani v. CIT* [1963] 48 ITR 262. That was also a case u/s 28(1)(c) and the ITO who had issued the notice to the assessee, after hearing the assessee, made a draft order for the imposition of a penalty. He was then transferred and his successor, after looking into the papers, concurred with the order of his predecessor and made an order imposing penalty after getting the sanction of the IAC. On a reference, the court held that the order of penalty was not invalid merely because the succeeding officer who made the order had not heard the assessee himself. Sinha J., speaking for the Bench, stated the legal position in this behalf as follows (at p. 268):

"A hearing of a case may be of many kinds. It usually involves the calling of witnesses, their examination and cross-examination and then arguments are addressed to the Tribunal. Where witnesses have been called and examined, or where arguments have been advanced, it is clear that one man cannot hear the case and another man pass judgment. The reason is that much may depend on the view that the Tribunal takes as to the credibility of witnesses and his mind may be swayed one way or the other by the demeanour of witnesses and as a result of arguments. This is such an intangible and personal task, that it cannot be handed over to the successor. Where, however, no witnesses have been called and no arguments have been advanced, but the matter depends on written objections filed, then, the successor is in the same position as the officer who originally was in the conduct of the case. Therefore, as long as the successor applies his mind to the materials before him, this is sufficient."

16. We are in respectful agreement with this legal position. In the present case, as noted above, no written objection whatsoever was filed by the assessee nor was any prayer made for an opportunity of making oral submission. Apart from

that, there is a distinction between a proceeding u/s 28(l)(c) and that u/s 28(l)(a). It no longer admits of any controversy after the decision of the Supreme Court in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, that penalty on the ground of concealment can be imposed only if there is a conscious and deliberate concealment on the part of the assessee. The onus lay on the department to establish such conscious and deliberate concealment and the findings given in an assessment proceeding would be relevant and admissible but not conclusive for the purpose. The department was required to prove conscious and deliberate concealment by some other independent material. Such is not the position in regard to failure to file the return in time as we have discussed above.

17. The Patna High Court in MURLIDHAR TEJPAL Vs. COMMISSIONER OF Income Tax, PATNA., had taken the view that the combined effect of Section 28(3) and Section 5(7C) of the 1922 Act is that the succeeding ITO has authority to pass an order upon the explanation of the assessee produced before his predecessor-in-office, if the assessee had failed to exercise his right u/s 5(7C) demanding that the proceedings should be reopened. The decision of the Calcutta High in Calcutta Tanneries (1944) Ltd., Calcutta Vs. Commissioner of Income Tax, Calcutta, was dissented from. In Kemailal Gatani case [1963] 48 ITR 262 the decision of the Patna High Court was referred to but it was not expressly dissented from and it was observed that that case was being decided upon the law as it stood before Section 5(7C) was introduced by the Amendment Act of 1953 and further "there is a conflict of decisions as to whether, under that sub-section, a rehearing or fresh hearing is necessary unless demanded by the assessee. I must not be taken to have expressed any opinion upon that point".

18. The Mysore High Court in Shop Siddegowda and Family Vs. Commissioner of Income Tax, Mysore, , under similar circumstances, followed the decision of the Patna High Court in MURLIDHAR TEJPAL Vs. COMMISSIONER OF Income Tax, PATNA., and of the Calcutta High Court in Kanallal Gatani [1963] 48 ITR 262 but distinguished the decision of that court in Calcutta Tanneries (1944) Ltd., Calcutta Vs. Commissioner of Income Tax, Calcutta, . The view taken in this case was that where one ITO issues a notice u/s 28(3) of the 1922 Act, to the assessee calling upon him to appear and show cause why penalty should not be levied and the assessee submits his explanation in writing, but does not choose to appear or ask for an opportunity to adduce evidence or address arguments, a successor officer has the authority to impose a penalty after considering the written representations of the assessee, without giving a fresh opportunity of being heard, if the assessee does not seek to reopen the proceedings as contemplated by the first proviso to Section 5(7C). The same view has been taken by the same court in Hulekar and Sons Vs. Commissioner of Income Tax, Mysore, . These decisions have been followed by the Rajasthan High Court and it has taken the same view in A. C. METAL WORKS Vs. COMMISSIONER OF Income Tax, DELHI AND RAJASTHAN.,

19. In *Mahendra Rambhai Patel Vs. Controller of Estate Duty, Gujarat State*, certain orders of penalty imposed on the petitioner-firm under Sections 28 and 46(1) of the 1922 Act had been challenged. One of the grounds of challenge was that the notice for imposing a penalty u/s 28(3) was issued by one ITO while the order imposing the penalty was passed by another officer. It was not disputed that even though the notice was issued by one ITO, the order of penalty could be imposed by another ITO. But the argument was that before the succeeding-ITO passed the order of penalty, he should have given a fresh notice to the firm and given a fresh opportunity to the firm to make its submissions. The argument was sought to be supported by the decision of the Calcutta High Court in *Calcutta Tanneries (1944) Ltd., Calcutta Vs. Commissioner of Income Tax, Calcutta*, . The court, however, relying on the legal principles stated in the subsequent decision of the Calcutta High Court in *Kanailal Gatani [1963] 48 ITR 262*, observed (at p. 17 of 55 ITR):

"In the present case all that was done by the firm in reply to the notice u/s 28(3) was to file a written submission and neither any oral evidence was taken nor were any oral arguments heard by the Income- tax Officer who issued the notice. The successor of the Income Tax Officer who issued the notice was, therefore, entitled to apply his mind to the materials before him and to make the order of penalty which has been impugned in the present petition. "

20. We now come to the two decisions of the Andhra Pradesh High Court on which the assessee placed his reliance. In *Anantha Naganna Chetty Vs. The Commissioner of Income Tax, Andhra Pradesh, Hyderabad*, , the decisions which we have discussed above were referred to and distinguished. It would, therefore, be necessary to refer to the facts of that case. There, the assessee, an individual, failed to disclose his share in a partnership firm for the assessment year 1949-50. His contention was that he had nothing to do with the firm and he was a mere financier and had received only interest on the amount which he had supplied to the firm. This contention was rejected and he was assessed on the share of income from that firm also. Penalty proceedings were taken against him and again he put forward the same explanation and also stated that since the firm had been dissolved, the penalty was not eligible. After this explanation was filed, the ITO who had issued notice u/s 28(3) of the 1922 Act was transferred and was succeeded by a new ITO. The succeeding-ITO without issuing any notice or informing the assessee of his intention to continue the proceedings passed an order levying penalty on the assessee.

21. The penalty order was challenged. The view taken by the court was that the power to continue the proceeding by the succeeding officer u/s 5(7C) is made expressly subject to the right of the assessee to reopen or rehear the case under the first proviso to Section 5(7C). It was held that even though Section 5(7C) does not in terms expressly provide for any notice by the succeeding officer to the assessee informing him of his intention to continue the proceedings from the stage at which his predecessor had left, by necessary implication it provided for

such an intimation. Accordingly, the succeeding officer must give notice to the assessee before he decides to continue the proceedings from the stage where it was left by his predecessor. Following this decision, in *Commissioner of Wealth-tax Vs. Smt. Azizunnissa Begum*, also the court has taken the same view. With respect we are not inclined to agree that it is implicit in the first proviso to Section 39 of the Act or in Section 129 of the I.T. Act that the succeeding officer must give notice to the assessee before he decides to continue the proceeding from the stage where it was left by his predecessor in each and every case. The requirement would vary with the facts of each case. As in the instant case where the assessee had not even put in an appearance, we do not think that such a statutory requirement can be read in this provision.

22. Apart from *Calcutta Tanneries (1944) Ltd., Calcutta Vs. Commissioner of Income Tax, Calcutta*, , the Appellate Tribunal has referred to two other decisions: *SATPRAKASH RAM NARANJAN Vs. COMMISSIONER OF Income Tax,* and *Ram Saran Dass Kapur Vs. Commissioner of Income Tax, Patella*, . Both these decisions are of the Punjab & Haryana High Court. The decision in *Calcutta Tanneries (1944) Ltd., Calcutta Vs. Commissioner of Income Tax, Calcutta*, has been followed while those of the other High Courts, which we have discussed above, have been distinguished. We find that on facts both these cases are distinguishable. In *SATPRAKASH RAM NARANJAN Vs. COMMISSIONER OF Income Tax,* , the assessee filed an appeal against the assessment order and while the appeal was pending, the ITO, B-Ward, issued a notice u/s 28(I)(c) of the 1922 Act. In reply to that notice the assessee requested that till the disposal of the quantum appeal, the penalty proceedings may be kept in abeyance. After the disposal of the appeal the ITO, C-Ward, to whom the jurisdiction over the assessee-firm had been transferred in the meantime, imposed a penalty on the assessee without giving any further opportunity to the assessee. The penalty order was challenged and on a reference it was held that the ITO, C-Ward, was bound to give the assessee an opportunity of being heard and the order imposing the penalty was illegal. It would be seen that the facts of that case were entirely different from those of the instant case.

23. In *Ram Saran Dass Kapur Vs. Commissioner of Income Tax, Patella*, , in answer to a notice issued to the assessee u/s 28(3) of the 1922 Act, the assessee submitted a written objection and asked for a personal hearing. The officer gave a personal hearing but before he could give a decision, the case was transferred to another ITO, who passed an order imposing penalty without himself giving a personal hearing to the assessee. The penalty order was challenged and it was held to be bad in law. The facts of that case also were different from those of the instant case.

24. To conclude, therefore, in our opinion on the facts of the instant case, the Appellate Tribunal was not right in holding that the succeeding officer should have given an opportunity of hearing to the assessee and that the absence of the same amounted to a violation of any principles of natural justice.

25. We, therefore, answer both the parts of the question as reframed by us in the negative, in favour of the Department and against the assessee. The Department is entitled to costs which we assess at Rs. 250.