
(1971) 08 KL CK 0023

In the High Court Of Kerala

Case No : Income-tax Reference No. 11 of 1969

Dawn and Co.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 17-08-1971

Acts Referred:

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

Citation : (1973) 87 ITR 71

Hon'ble Judges : T.S. Krishnamoorthy Iyer, J;K.K. Mathew, J

Bench : Division Bench

Advocate : C.M. Dewan, for the Appellant; P.K. Krishnakutty Menon, for the Respondent

Judgement

Krishnamoorthy Iyer, J.—The Income Tax Appellate Tribunal has at the instance of the assessee referred u/s 256(1) of the Income Tax Act, 1961, the following question :

" Whether, on the facts and in the circumstances of the case, the levy of penalty u/s 271(1)(a) is justified in law?"

2. The reference relates to the assessment year 1963-64. The Income Tax Officer served a notice on the assessee u/s 139(2) of the Income Tax Act, 1961, on June 28, 1963, requiring him to file a return of his total income for the assessment year 1963-64. The assessee should have filed the return in pursuance to the notice on July 28, 1963, but he" filed the return only on December 2, 1963. The assessment was completed on February 27, 1964.

3. The Income Tax Officer issued a notice to the assessee u/s 271(1)(a) to show cause why a penalty should not be imposed for failure to furnish the return of total income within 30 days from the date of service of notice u/s 139(2) of the Income Tax Act, 1961. The assessee filed his explanation to the effect that he had a statutory right to file the return on or before September 30, 1963, u/s 139(1) of the Income Tax Act, 1961, and hence the notice issued by the Income

Tax Officer calling upon him to file the return before September 30, 1963, is invalid. The assessee also pointed out circumstances to explain the delay in filing the return in pursuance to the notice u/s 139(2) of the Income Tax Act.

4. The Income Tax Officer being not satisfied with the reasons given by the assessee imposed on him a penalty of Rs. 5,166. The decision of the Income Tax Officer was confirmed by the Appellate Assistant Commissioner and by the Tribunal.

5. The plea that the imposition of penalty is illegal because the day fixed in the notice u/s 139(2) of the Income Tax Act, 1961, for filing the return was earlier than the day on which the return should have been filed u/s 139(1) of the Act, was not pressed before us. The return in pursuance to Section 139(1) should have been filed on September 30, 1963. Section 139(1) applies only to cases where a notice u/s 139(2) has not been issued. The said plea of the assessee cannot also legally stand. The finding of the Tribunal is stated thus :

" It is also not possible to accept the plea that the assessee was under a bona fide impression that the return need be filed only later. Such a wrong impression will not save the assessee from the penal consequences for not filing the return within the time and such plea cannot be countenanced."

6. Section 271(1)(a) of the Income Tax Act, 1961, reads :

"271. (I) If the Income Tax Officer or the Appellate Assistant Commissioner, in the course of any proceedings under this Act, is satisfied that any person-

(a) has without reasonable cause failed to furnish the return of total income which he was required to furnish under Sub-section (1) of Section 139 or by notice given under Sub-section (2) of Section 139 or Section 148 or has without reasonable cause failed to furnish it within the time allowed and in the manner required by Sub-section (1) of Section 139 or by such notice, as the case may be, or.....

he may 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 the 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;"

7. It is clear from the above provision that to attract the penalty the failure to file the return within the time fixed in the notice u/s 139(2) should have been without reasonable cause. What is reasonable cause should depend upon the circumstances of each case. On a mere reading of the section it is clear that a mere omission to file the return will not entitle the imposition of penalty as the section is not absolute in terms. It was submitted on behalf of the assessee that in the nature of the wording of Section 271, some blameworthy mental condition constituting the default should be proved by the department against the

assessee before the imposition of the penalty. It was also pointed out by the assessee that the provision being penal in character the burden is on the department to prove that the default was due to some deliberate act on the part of the assessee as a result of some blameworthy mental condition.

8. The words " has without reasonable cause failed to furnish it within the time allowed " in Section 271(1)(a) of the Income Tax Act, 1961, show that mens rea is an ingredient to be proved by the department before the imposition of penalty. In Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, their Lordships of the Supreme Court in considering the nature of the proceedings u/s 28 of the Indian Income Tax Act, 1922, which corresponds to Section 171 of the Income Tax Act, 1961, observed :

" The first point which falls for determination is whether the imposition of penalty is in the nature of a penal provision. The determination of the question of burden of proof will depend largely on the penalty proceedings being penal in nature or being merely meant for imposition of an additional tax, the liability to pay such tax having been designated as penalty u/s 28... . It is true that penalty proceedings u/s 28 are included in the expression " assessment" and the true nature of penalty has been held to be additional tax. But, one of the principal objects in enacting Section 28 is to provide a deterrent against recurrence of default on the part of the assessee. The section is penal in the sense that its consequences are intended to be an effective deterrent which will put a stop to practices which the legislature considers to be against the public interest. ... It appears to have been taken as settled by now in the the sales tax law that an order imposing penalty is the result of quasi-criminal proceedings Hindustan Steel Ltd. Vs. State of Orissa, . In England also it has never been doubted that such proceedings are penal in character : Fattorini (Thomas) (Lancashire) Ltd. v. Inland Revenue Commissioners [1942] A.C. 643: [1942] 1 All E.R. 619: 24 T.C. 328: [1943] 11 ITR 50. The next question is that when proceedings u/s 28 are penal in character what would be the nature of the burden upon the department for establishing that the assessee is liable to payment of penalty. As has been rightly observed by Chagla C.J., in Commissioner of Income Tax, Ahmedabad Vs. Gokuldas Harivallabhdas, the gist of the offence u/s 28(1)(c) is that the assessee has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income and therefore, the department must establish that the receipt of the amount in dispute constitutes income of the assessee. If there is no evidence on the record except the explanation given by the assessee, which explanation has been found to be false, it does not follow that the receipt constitutes his taxable income."

9. Hindustan Steel Ltd. v. State of Orissa had to consider the scope of Section 25(1)(a) of the Orissa "Sales Tax Act, 1947, which provides for imposition of penalty for failure to register as a dealer u/s 9(1) of the Act. Their Lordships of the Supreme Court observed :

" But the liability to pay penalty does not arise merely upon proof of default in

registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of a discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute."

10. Unlike Section 271(1) of the Income Tax Act, 1961, the provision of the Orissa Sales Tax Act considered by the Supreme Court is absolute in terms in that it rules out mens rea as an essential ingredient for the imposition of penalty. Yet their Lordships of the Supreme Court stressed the necessity of mens rea or knowledge of the wrongfulness of the act before imposing the penalty.

11. Counsel for the department contended that Anwar Ali's case was concerned with Section 28(1)(c) of the Indian Income Tax Act, 1922, corresponding to Section 271(1)(c) of the Income Tax Act, 1961, and it has no application to Section 271(1)(a) of the Act. It was also argued that on account of the Explanation to Section 271(1) of the Income Tax Act, 1961, the statute itself gives rise to a presumption of mens rea or knowledge of the wrongful act against the assessee even for purposes of Section 271(1)(c) in cases covered by the Explanation and that is an indication to show that the very omission to file the return will give rise to a presumption of conscious violation of Section 139(2) by the assessee. It was also pointed out that if the burden is cast on the department to prove want of reasonable cause for failure of the assessee to furnish the return of total income, in effect it will be placing an onus on the department which it will be impossible for them to discharge. According to counsel for the department, a reasonable interpretation of the provision will be to hold that the duty is on the assessee to explain his default and convince the department that it was occasioned by reasonable cause. It is not necessary for us to examine the merits of these contentions, however interesting and plausible they may be, in view of these categorical statement of law by the Supreme Court. At the same time we do not interpret Anwar Ali's case or the case of Hindustan Steel Ltd. to mean that even in cases where an assessee does not offer any explanation to a notice to show cause against the imposition of penalty for default in filing the return in time u/s 139(2), it is not open to the Income Tax Officer to infer dishonest disregard of law on the part of the assessee for the imposition of the penalty. The principle of the decision of the Supreme Court is only to the effect that by the mere rejection of the explanation of the assessee to the show cause notice it does not automatically follow that the necessary

ingredient of Section 271(1)(a) of the Income Tax Act, 1961, has been made out. It is the duty of the department to point out circumstances from which an inference that the assessee acted deliberately in violation of law can be drawn.

12. If examined in the light of the principles stated, the finding of the Tribunal cannot stand. The order of the Tribunal has proceeded on the basis that a more default in the filing of the return will attract penalty and then proceeded to consider the explanation of the assessee. The approach made is, therefore, not warranted either by the wording of the section or by the decisions of the Supreme Court. The view of the Tribunal that even if the assessee bona fide thought that he need file the return only according to Section 139(1) in spite of the, notice u/s 139(2) it will not constitute sufficient cause to take the assessee out of Section 271(1) is also not correct. It only means that the assessee was not ignorant of law but misunderstood the provision. Such a bona fide impression will prove absence of mens rea or a deliberate disobedience of the provisions of law, which is necessary for the imposition of penalty.

13. There are no circumstances pointed out by the Tribunal apart from the finding we referred to, to justify the imposition of penalty. We, therefore, hold that the levy of penalty u/s 271(1)(a) is not justified in law. We answer the question referred in the negative, that is in favour of the assessee and against the department. There will be no order as to costs.

14. A copy of this judgment will be sent by the Registrar under his signature and the seal of this court to the Income Tax Appellate Tribunal, Cochin Bench.