

(1970) 05 DEL CK 0003

In the Delhi High Court

Case No : Income-tax Reference No. 54 of 1964

Durga Timber Works

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 29-05-1970

Acts Referred:

Citation : (1971) 79 ITR 63

Hon'ble Judges : V.S. Deshpande, J;Hardayal Hardy, J

Bench : Division Bench

Advocate : D.S. Randhawa, for the Appellant; A.N. Kirpal and Dalip Kapur, for the Respondent

Judgement

Hardy, J.—The following two questions have been referred by the income tax Appellate Tribunal (Delhi Bench B) to this court u/s 256(1) of the Income Tax Act, 1961, which will hereafter be referred to as the Act:

" 1. Whether, on the facts and circumstances of the case, the penalty order is in contravention of the provisions of sections 274 and 275 of the Income Tax Act, 1961 ?

2. Whether, on the facts and in the circumstances of the case, the levy, of penalty u/s 271(I)(c) of the Income Tax Act, 1961, is justified ? "

2. The assessed is a registered firm dealing in timber. For the assessment year 1960-61, it filed a return declaring an income of Rs. 12,225. In the course of assessment proceedings the Income Tax Officer noticed cash credit entries totalling up to a figure of Rs. 17,500 in certain accounts and that they were shown to have been squared up. He also noticed an account in the name of karkhana at ledger folio 22 showing a debit of Rs. 36,900. This was stated to be an account of a factory supposedly set up by the assessed. The account showed adjustments to the extent of Rs. 22,800 only. The assessed was asked to adduce evidence to prove the cash credit of Rs. 17,500 and also to explain the investment of the unadjusted balance of Rs. 14,100 in the karkhana account. It

failed to do so and surrendered, the two amounts which made up a total of Rs. 31,600 for inclusion in its income. As a result, an assessment was made on a total income of Rs. 56,322 which amount included a sum of Rs. 31,600 as the assessed's income from undisclosed sources.

3. The assessment order was passed on March 20, 1965. In the assessment order the Income Tax Officer directed the issue of a penalty notice to the assessed for concealment of particulars of income. In the first instance the Income Tax Officer himself issued the penalty notice on March 20, 1965, directing the assessed to appear before him, but subsequently on March 15, 1967, he issued a second notice requiring the assessed to appear before the Inspecting, Assistant Commissioner of Income Tax, Range II, New Delhi. The latter also issued a separate notice on the same date directing the assessed to appear before him on March 17, 1967. This notice having been duly served on the assessed before March 17, 1967, the assessed appeared before the Inspecting Assistant Commissioner on that date accompanied by a counsel and was fully heard.

4. It was pleaded that since the amounts had been surrendered for inclusion in the assessed's income no penalty was leviable. The contention was rejected and an order imposing a penalty of Rs. 3,000 u/s 271(1)(c) was passed on the same day.

5. Against the order imposing penalty the assessee filed an appeal before the Income Tax Appellate Tribunal, where it was contended that the penalty proceedings were not commenced during the assessment proceedings as the actual notice requiring the assessed to appear before him was issued by the Income Tax Officer after he had already passed the order of assessment. The authority of the Income Tax Officer to issue such a notice was also challenged and it was urged that he should have referred the assessed's case to the Inspecting Assistant Commissioner even before the conclusion of the assessment. The Inspecting Assistant Commissioner's notice was admittedly issued long after the assessment order was made. The penalty proceedings, Therefore, could not be said to have been commenced during the course of assessment proceedings.

6. It was next contended that the department had not proved that there was concealment of income by the assessed. All these contentions were repelled and the order imposing penalty was upheld. At the instance of the assessed, however, the Tribunal has stated the case and referred the two questions mentioned above.

7. At the hearing of the reference, the same Contentions have been repeated by the assessed's counsel. It is urged that u/s 275 no order imposing a penalty under Chapter XXI which includes Section 271(1)(c), with which we are concerned in this case, can be passed after the expiration of two years from the date of the completion of the proceedings in the course of which the proceedings

for the imposition of penalty have been commenced. This means that the penalty proceedings should be commenced while the assessment proceedings are still on, while in the present case the assessment proceedings came to an end on March 20, 1965, when the assessment order was passed while the notice regarding penalty proceedings was issued by the Income Tax Officer after he had already concluded the assessment. The contention urged by the counsel is that the proceedings for levy of penalty were, Therefore, not properly commenced during the course of assessment proceedings.

8. Support for this argument is sought from the observations of the Nagpur Bench of the Bombay High Court in *MISS SAROJ NAYUDU Vs. APPELLATE ASSISTANT COMMISSIONER OF Income Tax, NAGPUR and ANOTHER.*, where it was said at page 655 of the report:

"A perusal of the opening words of Section 271(1) and Section 275 of the Income Tax Act, 1961, would show that the proceedings for imposition of penalty have to be commenced before the completion of assessment proceedings. Section 275 provides that no order imposing a penalty under this chapter shall be passed after the expiry of two years from the date of completion of proceedings in the course of which proceedings for imposition of penalty have been commenced. Similarly, the opening words of Section 271(1) provided for the Income Tax Officer or the Appellate Assistant Commissioner being satisfied in the course of any proceedings under the Act that the assessed has done one or the other of the defaults mentioned in the sub-clauses and on his being satisfied he may direct such person to pay by way of penalty the amounts indicated in the subsequent provision. Thus, the event which gives a cause of action for initiation of proceedings for imposing penalty is not held over until after the completion of assessment proceedings,"

9. Learned counsel agreed that the above decision has been dissented from by this court in *Jain Bros. and Others Vs. Union of India*, and its decision had since been approved by the Supreme Court, *Jain Bros. and Others Vs. The Union of India (UOI) and Others*, but he submits that nothing contrary to what was said in the above passage had been said in the judgment of this court. Even so we fail to see how he can derive any help from the passage extracted above. It is true that Section 275 of the Act does not directly lay down that penalty proceedings must be commenced before the completion of the main proceedings, i.e., assessment proceedings before the Income Tax Officer or proceedings in appeal before the Appellate Assistant Commissioner, in the course of which the satisfaction of the officer concerned that the assessed has either concealed the particulars of his income or furnished inaccurate particulars of such income, is reached u/s 271(1), yet by using the words " in the course of which the proceedings for the imposition of penalty have been commenced " there is ample indication of legislative intention that the proceedings for the levy of penalty should have been commenced before the completion of the main proceedings. We do not read the observation in the case of *MISS SAROJ NAYUDU Vs. APPELLATE ASSISTANT*

COMMISSIONER OF Income Tax, NAGPUR and ANOTHER., as saying something different. In fact a construction similar to the one we are inclined to put on Section 275 has been placed on it by a Division Bench of the Gujarat High Court in D.M. Manasvi Vs. Commissioner of Income Tax, Gujarat II, . The learned judges in that case referred to several cases which were decided under the Act of 1922, where the words "in the course of any proceedings under the Act" as used in Section 28(1) were examined and came to the conclusion that since an almost similar phrase had been used in Section 271(1) of the 1961 Act, the combined effect of Section 275 read with Section 271(1) was that the proceedings for the levy of a penalty must be commenced before the completion of the main proceedings which in the present case would mean assessment proceedings.

10. We are in respectful agreement with what has been said in that case and Therefore do not consider it necessary to embark upon a fresh survey of the authorities. It is nobody's case that the proceedings for levy of penalty in the present case could have been commenced after completion of the assessment proceedings. It is common ground that they had to be commenced before the completion of the assessment proceedings. The stand taken by the revenue is that they were in fact so commenced when the Income Tax Officer gave a direction in the assessment order itself that a penalty notice should be, issued to the assessed for concealment of particulars of its income. The short question Therefore is whether such a direction amounts to commencement of penalty proceedings and those proceedings have Therefore been commenced in the course of assessment proceedings. The case which seems nearest to the case before us is a decision of the Madras High Court in Artisan Press Ltd. Vs. Income Tax Appellate Tribunal and Another, . The decision was no doubt u/s 28 of the Act of 1922, which empowered also the Appellate Tribunal in addition to the Income Tax Officer and the Appellate Assistant Commissioner to initiate action for levy of penalty. In that case the Appellate Tribunal, in the course of proceedings in appeal before it, discovered that the assessed-company had concealed its income and furnished inaccurate particulars thereof in its return. The Tribunal recorded a note to that effect in the order while disposing of the appeal. This note was recorded on October 7, 1955, and on the same day a direction for issue of the notice u/s 28 was given. The order disposing of the appeal was served on the assessed on October 13, and in the meanwhile the notice u/s 28 was issued and served on October 10, 1955. It was held that the direction to the office to issue a notice on October 7 was the first step taken in connection with the penalty proceedings and, Therefore, the terms of Section 28(1) were satisfied and the order of the Tribunal was within its jurisdiction.

11. In our opinion, the direction given by the Income Tax Officer in the course of his assessment order that the penalty notice should be issued to the assessed for concealment of particulars of income, being the first step taken in that behalf, amounts to commencement of penalty proceedings and, Therefore, the proceedings in the present case must be held to have been commenced in the course of the assessment proceedings.

12. Learned counsel for the assessed then contends that Section 274(2) enjoins that in a case in which the minimum penalty imposable exceeds a sum of Rs. 1,000 the Income Tax Officer shall refer the case to the Inspecting Assistant Commissioner who shall, for the purpose, have all the powers conferred under this chapter for the imposition of penalty. According to the learned counsel, since the section requires that the Inspecting Assistant Commissioner shall have all the powers conferred under Chapter XXI for "the imposition of penalty in such a case it impliedly takes away the powers of the Income Tax Officer to initiate proceedings u/s 271 which is one of the sections included in that chapter. All action for initiating penalty proceedings in such a case must Therefore be taken by the Inspecting Assistant Commissioner. Accordingly, as soon as the Income Tax Officer reaches the conclusion that there has been concealment, of income which calls for imposition of penalty it becomes his duty to refer the case to the Inspecting Assistant Commissioner, who alone shall take all further action in the matter and that all this must be done before the assessment order is passed by the Income Tax Officer.

13. We find it difficult to accept this contention. From the mere fact that in a case to which Sub-section (2) of Section 274 applies the Income Tax Officer is required to refer the case to the Inspecting Assistant Commissioner, it does not follow that the Income Tax Officer's own powers have been completely taken away. We have already said that the satisfaction that there has been concealment of income, etc., and the conduct of the assessed calls for imposition of penalty is of the Income Tax Officer himself and that satisfaction has to be reached in the course of the assessment proceedings. It is only when the Income Tax Officer finds that the minimum penalty imposable will exceed a sum of Rs. 1,000, that he is required to refer the case to the Inspecting Assistant Commissioner. If he is required to refer the case to the Inspecting Assistant Commissioner so that the latter being a superior authority should apply his own mind to the facts of the case because the penalty imposable exceeds a sum of Rs. 1,000, it does not mean that he should refer the assessed's case to the Inspecting Assistant Commissioner, even before passing the assessment order which is certainly a part of the assessment proceedings. The powers conferred on the Inspecting Assistant Commissioner are for the specific purpose of imposition of penalty and those powers can very well be exercised by him when action for initiating penalty proceedings has already been taken by the Income Tax Officer in the course of assessment proceedings and thereafter the case has been referred by him to the Inspecting Assistant Commissioner. We Therefore hold that it would be sufficient compliance with the provisions of Section 274 if the Income Tax Officer records in the course of the assessment order that notice for penalty proceedings should issue to the assessed and all further action thereafter is taken by the Inspecting Assistant Commissioner. The only limitation placed by Section 275 is that no order imposing a penalty shall be passed after the expiration of the period of two years from the date of the completion of the assessment proceedings. In the present case, the proceedings for imposition of

penalty as already held by us commenced on March 20, 1965, and the order imposing penalty was passed on March 17, 1967, i.e., before the expiry of two years from the date of the assessment order.

14. This takes us to the next contention urged by the counsel for the assessed. It will be seen that during the course of the assessment proceedings the assessed was called upon to prove the genuineness of the cash credits and to explain the source of investment in the karkhana business. The assessed was unable to do so and he surrendered these amounts to be included in his income. He thus admitted that the amounts in question represented his own income. The statement of case submitted by the Tribunal shows that the assessed filed an appeal against the order of assessment but it did not challenge the inclusion of the sum of Rs. 31,600 to its income. The question for consideration, Therefore, is whether in these circumstances there was material before the Income Tax authorities to justify the levy of penalty u/s 271(1)(c) of the Act. The Tribunal has held that there was such material and that, under the circumstances, the department was not called upon to prove by any independent evidence that the assessed had concealed its income. This is a finding of fact which is binding on us in the exercise of our advisory jurisdiction u/s 256 of the Act.

15. The argument of the learned counsel for the assessed is that almost all the High Courts are unanimous in holding that assessment proceedings are distinct and separate proceedings and, although the materials disclosed in assessment proceedings can be taken into consideration for the purpose of penalty proceedings, they do not constitute *res judicata*. Penalty proceedings being in the nature of quasi-criminal proceedings, the onus is upon the department to establish that the assessed is guilty of violation of the provisions contained in Section 28 of the Income Tax Act, 1922, the material portion of which is identical with Section 271 of the Act of 1961. In such circumstances, it becomes the duty of the department to lead independent evidence to establish these facts and not merely to rest its case on the finding recorded in the assessment proceedings. This view of law is now authoritatively settled by the judgment of the Supreme Court in *Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali*, delivered on April 29, 1970, in which their Lordships have approved the decision of the Bombay High Court in *Commissioner of Income Tax, Ahmedabad Vs. Gokuldas Harivallabhdas*, and affirmed the decision of the Calcutta High Court, *Commissioner of Income Tax (Central), Calcutta Vs. Anwar Ali*, . It has been held that, in the absence of cogent and material evidence from which it could be inferred that the assessed had concealed the particulars of his income or had deliberately furnished inaccurate particulars in respect of the source of the disputed amount and that it was a revenue receipt, no order for imposition of penalty can be passed merely on the basis of the assessed's Explanation having been held to be false. It will, however, be seen that what has been said by their Lordships is that the finding given in the assessment proceedings being for the purpose of determining or computing the tax is not conclusive, but the finding is nonetheless good evidence. It is true that mere falsity of the assessed's

Explanation is not sufficient to justify the imposition of penalty for when the assessed is called upon to show cause why penalty should not be imposed on him he may adduce evidence which he could not produce earlier or he may explain to the satisfaction of the authority dealing with the penalty proceedings that the disputed amount was a receipt of some other kind and not a revenue receipt and was, Therefore, not taxable. He may even satisfy the authority that the concealment or furnishing of inaccurate particulars was not. deliberate on his part and the mistake was bona fide.

16. The case before us is, however, not a case of falsity of Explanation given by the assessed. It is a case where a device or deliberate disguise was created by the assessed for the purpose of concealing its income. Cash credit entries were made in the books of account to the tune of Rs. 17,500 and the accounts were shown as squared up. Likewise, a sum of Rs. 36,900 was shown as having been invested in a supposed factory. Out of that amount a sum of Rs. 22,800 was shown as adjusted but for the balance of Rs. 14,100 no Explanation was forthcoming. When the assessed was challenged to adduce evidence to establish these cash credits and to explain the source of investment of Rs. 14,100 debited in the karkhana account it admitted that the two amounts could be treated as its concealed income and included in its total income for that year. Under the circumstances, it would amount to laying an impossible burden of proof on the department and making the provisions for imposition of penalty wholly unworkable, if one were to insist that the department should still be called upon to prove by independent evidence that the assessed had concealed its income or that the amounts were not revenue receipts. It was not for the fun of it that the assessed surrendered the amounts and agreed that they be treated as its income from undisclosed sources. When he was given a second opportunity to adduce evidence or to explain away its earlier admission it still stuck to the same position. It also did not give any Explanation that the mistake was bona fide. The levy of penalty for concealment of income, in such circumstances, appears to us to be fully justified.

17. The result is that both the questions are answered in favor of the revenue and against the assessed. The Commissioner will also have his costs of these proceedings. Counsel's fee Rs. 250.