

(1981) 02 GUJ CK 0005
In the Gujarat High Court
Case No : IT Reference No. 51 of 1976

Himatram Mathurdas and Co.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 13-02-1981

Acts Referred:

Evidence Act, 1872 — Section 106

Income Tax Act, 1961 — Section 143(1), 143(2), 271, 271(1), 271(1)(a)

Citation : (1981) 6 TAXMAN 173

Hon'ble Judges : B.J. Divan, C.J.; B.K. Mehta, J

Bench : Division Bench

Advocate : R.D. Pathak, for the Appellant; N.U. Raval and R.P. Bhatt, for the Respondent

Judgement

B.J. Divan, C.J.—In this case, at the instance of the assessee, the following three questions have been referred to us for our opinion: (1) Whether the Tribunal has been right in law in holding that the initial onus of giving reasonably plausible explanation lies on the defaulting assessee as contemplated u/s 271(1)(a) read with section 274 of the income tax Act, 1961? and

(2) Whether the Tribunal rightly held that it would be throwing an impossible burden on the revenue to prove the absence of reasonable cause for late filing of the return of income by the taxpayers? and

(3) Whether the Tribunal, on the facts of the case, rightly upheld the levy of penalty of Rs. 12,040 u/s 271(1)(a) of the Act in this case?

In this case we are concerned with the assessment years 1965-66 and 1966-67. The Tribunal passed a common order confirming the levy of penalties for 1965-66 and 1966-67 but the assessee has sought reference only in respect of the assessment year 1966-67 in which year a penalty for default was levied for the late filing of the return u/s 271(1)(a) to the extent of Rs. 12,040. 2. The return for the year under reference, i.e., assessment year 1966-67, was due on

June 30, 1966, but the assessee filed it on September 24, 1970. The assessee is a partnership firm. In the penalty proceedings initiated by the ITO for the delay in filing the return in time and, in these proceedings u/s 271(1)(a), the assessee was asked to explain as to why penalty should not be imposed upon it. The plea of the assessee was that the firm's accountant was ill at the relevant time and his ill health prevented it from filing the return in time. Before the ITO no details in this regard were furnished and, even the name of the accountant and the period of his illness were not communicated to the ITO. That officer refused to accept the explanation which, according to him, was vague, and the ITO observed that the assessee had not requested for extension of time for filing the return and a penalty of Rs. 12,040 was levied and the firm was treated as an unregistered firm u/s 271, sub-section (2).

3. Regarding the question of penalty, the matter was taken up in appeal before the AAC and the assessee put forward the same explanation, namely, the ill health of the Mehtaji, and a certificate dated June 3, 1972, from an Ayurvedic practitioner was produced and the certificate showed that the Mehtaji, one Mahashanker Manekji Shukla, was suffering from coronary diseases and low pressure and he was under the treatment of the Ayurvedic practitioner. The Mehtaji was also examined by a heart specialist and ultimately he died on June 25, 1970, as a result of an heart attack. It was also mentioned in the certificate that the Mehtaji had been suffering for the last about five years before his death from this trouble. The AAC confirmed the imposition of penalty and he observed that it was the responsibility of the partners to file the return, not of the accountant, that is, the Mehtaji. It was confirmed primarily on the ground that the assessee had not established any reasonable cause for the late filing of the return.

4. The matter was taken in further appeal to the income tax Appellate Tribunal and while confirming the order of the AAC, the Tribunal observed that there were as many as six partners looking after the appellant-firm's business and it was not shown to the Tribunal that all of them were not actively participating in the management of the firm's affairs. The Tribunal observed:

In the first place, the assessee had been extremely careless in not attending to its statutory obligations of filing the returns in time but further several notices issued by the ITO u/s 143(2) and 143(1) were also of no avail to get the assessee's co-operation in finalising the assessments. We are conscious of the fact that the non-co-operation of the taxpayers in the assessment cannot justify imposition of penalty but at the same time we are unable to accept the proposition canvassed on behalf of the assessee that even where the assessee chooses to keep aloof after a show-cause notice is issued to him for explaining the default u/s 271(1)(a), it shall be for the ITO to prove that there was absence of reasonable cause. Accepting such a proposition would be asking the income tax Officer to do the impossible task of proving the absence of reasonable cause when the default of late filing stands committed. This certainly cannot be the

intention of the section. The provision of section 271(1)(a) was enacted for the purpose of imposing a penalty on an assessee, who had not filed his return during the prescribed time, and was enacted to serve as a deterrent for such lapses. It would be throwing an impossible burden on the revenue to prove the absence of reasonable cause in the case of assessee who do, not only default by not filing the return in time, but, further, refuse to acknowledge the show-cause notice issued to explain the case. The provisions contained in section 274 which govern the procedure for levying the penalty clearly indicate that the initial onus of giving reasonably plausible explanation lies on the defaulting assessee and if such onus is not chosen to be discharged, then the taxing authorities shall proceed to levy penalty as provided under the income tax Act.

5. The Tribunal ultimately confirmed the order of the AAC imposing a penalty of Rs. 12,040 on the assessee-firm. It is common ground before us between Mr. Pathak for the assessee and Mr. Raval for the revenue that in the quantum matter the assessment against the firm has been reduced in revision proceedings. The total assessment against the assessee-firm has been reduced in revision proceedings, and, as a result, the only penalty that can be imposed is on the basis of 25 per cent, of that figure, and that penalty has also been reduced to Rs. 3,260. A certified copy of that order passed in revision proceedings has been shown to us.

6. The whole approach of the Tribunal to the question of burden of proof is contrary to the decision of this High Court in the Full Bench decision in Addl. Commissioner of Income Tax, Gujarat Vs. I.M. Patel and Co., . There it has been laid down by the Full Bench (headnote):

The penalty which can be imposed u/s 271(1) of the income tax Act, 1961, is to be imposed on contumacious or fraudulent assessee. It is a quasi-criminal proceeding and 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. Whenever a statute defines an offence and provides a punishment for it, it is for the prosecution to prove all the ingredients of the offence. In penalty proceedings u/s 271(1)(a) of the Act, the assessee, upon whom the penalty is sought to be imposed, is in the position of an accused in a criminal trial and, therefore, all the ingredients of the offence for which the penalty can be imposed must be established by the revenue. It is from this aspect that one has to consider the question whether the words "failure without reasonable cause" in section 271(1)(a) constitute an ingredient of the offence or not. Looking to the wording of the section and on a plain reading of section 271(1)(a), it is obvious first that the failure to file the return may be with reasonable cause or without reasonable cause, but the offence for which the penalty is imposable is failure without reasonable cause to file the return within the time specified in the section and, therefore, it is for the revenue to establish as an ingredient that the failure in the particular case was without reasonable cause. Once the department has discharged that initial burden, it will be for the

assessee to show that there was reasonable cause on his part in failing to furnish the return in time. On the principles underlying section 106 of the Evidence Act, since the facts which constitute a reasonable cause are specifically within the knowledge of the assessee, it will be for him to establish those facts, but the department must first lead evidence which would go to show, *prima facie*, that the assessee had no reasonable cause in failing to file the return within the time specified. Mere failure to file the return within the time without anything more will not expose the assessee to penalty. Mere falsity of the explanation on the part of the assessee is not enough to constitute an offence under the section. In view of the decisions of the Bombay High Court in *Commissioner of Income Tax, Ahmedabad Vs. Gokuldas Harivallabhdas*, and of the Supreme Court in *Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali*, it is clear that the burden of proving all the ingredients of the offence is upon the department and if the department fails to lead any evidence on the point, besides merely pointing out that there was failure to furnish the returns within time, the department would fail so far as the penalty proceedings u/s 271(1)(a) are concerned.

7. Incoming to this conclusion, the Full Bench differed from the decision of the Orissa High Court in *Commissioner of Income Tax Vs. Gangaram Chapolia*. The Full Bench there held that u/s 271(1)(a) of the Act, failure "without reasonable cause" to furnish the return is an ingredient of the offence. Secondly, section 271 (1)(a) provides lot penalty in cases where the assessee has either, acted deliberately in defiance of law or was guilty of conduct, contumacious or dishonest, or acted in conscious disregard of his obligations. Thirdly, the legal burden is on the department to establish by leading some evidence that *prima facie* the assessee has without reasonable cause failed to furnish the return within the time specified in section 271(1)(a) read with the other relevant sections referred to in that section. Once this initial burden, which may be slight, has been discharged by the department, it is for the assessee to show, as in a civil case, on balance of probabilities, that he had reasonable cause for failing to file the return within the time specified. And, fourthly, mere falsity of the explanation furnished by the assessee cannot help the department in establishing its case against the assessee at the time of imposition of penalty.

8. Applying the principles laid down by the Full Bench in the above case to the facts of the case before us, in the instant case, beyond the fact of the late filing of the return, no evidence has been led by the revenue to discharge the burden of proof which has been laid by the Full Bench on the revenue to show that there was no reasonable cause on the part of the assessee in the late filing of his return. Falsity of the explanation given by the assessee cannot help the department in establishing its case against the assessee at the time of the imposition of penalty. In the instant case, the case of the assessee has been that all partners of the assessee-firm are at Tatanagar and are working there and occasionally one of the partners comes down to Nadiad and that partner for the time being attends to the affairs of the firm. All the work of filing returns, etc.,

was being attended to by Mehtaji of the firm who at the relevant time was suffering from coronary illness and ultimately the Mehtaji died of that illness in June, 1970. This would go to show that there is no contumaciousness on the part of the assessee in the delay in filing the return. Since the initial burden which has been placed on the revenue was not discharged by the revenue, the question of considering whether after the burden shifted to the assessee it has discharged that burden by leading evidence about the explanation does not arise for consideration. Under these circumstances, in the light of the principles laid down by the Full Bench in Addl. Commissioner of Income Tax, Gujarat Vs. I.M. Patel and Co., , it must be held that the revenue has failed to establish its case regarding the imposition of penalty.

9. We, therefore, answer the questions referred to us as follows: Question No. (1)-In the negative, that is, in favour of the assessee and against the revenue;

Question No. (2)-In the negative, that is, in favour of the assessee and against the revenue;

Question No. (3)-In the negative, that is, in favour of the assessee and against the revenue.

The Commissioner will pay the costs of this reference to the assessee.