

(1971) 11 RAJ CK 0020

In the Rajasthan High Court

Case No : Civil Income Tax Reference No. 27 of 1969

Indra and Co.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 19-11-1971

Acts Referred:

Income Tax Act, 1961 — Section 256, 271, 274, 275, 297

Citation : (1972) RLW 268 : (1971) WLN 686

Hon'ble Judges : S.N. Modi, J; L.N. Chhangani, J

Bench : Division Bench

Judgement

L.N. Chhangani, J.—The Income Tax Appellate Tribunal Delhi Bench, "B" has state a case and referred to us the following questions of law u/s 256(1) of the Income Tax Act, 1961 for our answer:

1. Whether on the facts and the circumstances of the case, the penalty proceedings had been validly initiated for levying penalty on the assessee u/s 271(1)(a) of the Income Tax Act, 1961?
2. Whether on the facts and in the circumstances of the case the penalty of Rs. 19,689. 34 paise levied u/s 271(1)(a) of the Income Tax Act, 1961, had been validly reduced to Rs. 5,000/-?

The question No. 1 is at the instance of the assessee and the question No. 2 is at the instance of the Commissioner of Income Tax. The relevant facts are these.

2. The assessee is a registered firm and the relevant assessment year is 1960-61. A notice u/s 22(2) of the Income tax Act, 1922 was served on the assessee on 1st June, 1960, The return was, however, filed on 18th July, 1962. The assessment was completed on 18th February, 1963 In the assessment order, the Income Tax Officer made the following observations:

Issue notice u/s 274 for filing belated return as notice u/s 22(2) was served on 1-6-60 as per signatures on office copy of notice u/s 22(2) on file and the return

was filed as late as 18-7-62.

Notice u/s 274 read with Section 271 was issued on the same day that is 18-2-63 on which date the assessment was completed. The assessee showed a cause for delay in filing the return. The Income Tax Officer did not accept the explanation of the assessee and imposed a penalty of Rs. 19,689. 34 calculated at the rate of two percent per month of tax of Rs. 40.182 34, P vide the Income Tax Officer's order dated 12-8-64. The assessee filed an appeal before the Appt Hate Assistant Commissioner alleging, inter alia, that the proceedings for imposition of penalty were not commenced before the completion of the assessment proceedings. The Appellate Assistant Commissioner held that "the penalty proceedings u/s 271 stand initiated with the recording of satisfaction by the Income Tax Officer that the assessae has committed default mentioned in Section 271 and since in the appellant's case the satisfaction was recorded by the Income Tax Officer during the course of assesstment proceedings, there was valid initiation of penalty proceedings. The other objection of the assessee with regard to the quantum of penalty was also over ruled The Appellate Assistant Commissioner dismissed the appeal. The assessee filed a second appeal before the Appellate Tribunal. The Appellate Tribunal agreed with the Appellate Assistant Com. that proceedings for the imposition of penalty were commenced before the completion of the assessment proceedings As regards the quantum of penalty, the Appellate Tribunal observed that as the default in filing the return was committed the day next following that is, 5-7-60 on which date the return was due and even though the default continued until 18-4-62. "but all the same since the default was committed at the time when the Income Tax, Act, 1922 was in force, the penalty imposed must also be commensurate with the penalty imposable under the Act as was in force at the time of the commission of the offence" The Appellate Tribunal, therefore reduced the penalty to Rs. 5000/-. The Commissioner of Income Tax and the assessee both submitted reference applications to the Appellate Tribunal and the Appellate Tribunal has stated the case and referred the questions of law which have been quoted above.

3. We have heard Mr. Kakkar for the assessee and Mr. Bhandari for the Revenue. In connection with the first question, Mr. Kakkar contended that the recording of the satisfaction by the Income Tax Officer in the assessment order and direction for the issue of penalty notice were not sufficient to hold that there was a commencement of penalty proceedings before the completion of the assessment. In support of his contention, he read some passages from Kanga and Palkhivala's Income Tax Act, 1961, 6th Edition, at page 1042 Law of Income Tax by A.C, Sampath Iyengar, 5th Edition, 1963-64, at page 1817, and Penalties & Prosecutions in Income Tax by Ramesh G. Sbarma, 1st Edition 1968 69, at page 66-67. In Kanga and Palkhivala's Income Tax, the portion emphasised reads as follows:

The notice u/s 274(1) asking the assessee to show cause why a penalty should not be levied for concealment of Income, must be issued before the assessment

order is made, as was done in *Sivagaminatha Moopnar and Sons Vs. Income Tax Officer, II Circle, Madurai and Another*, and *Vir Bhan Bansilal v. C.I.T.* 1968 ITR 616.

4. In *Law of Income Tax* by A.C Sompath Iyengar, the passage relied upon by the learned Counsel for the assessee reads as under:

The combined result of these three Sections is that (i) the proposes to levy penalty should be first conveyed to the assessee, (ii) opportunity should be afforded to him to meet the charge of penalty (iii) conveyance of the proposal to levy penalty should have taken place before "the date of the completion of the proceedings."

5. In the last mentioned book by Ramesh CSharma, the learned Counsel emphasised upon the following statement:

Evidently, the initiation of the penalty proceedings u/s 271 of the Act has to be done by issue of a notice to the assessee under sub Section (1) of that section requiring him to show cause why a penalty u/s 271 of the Act should not be levied on him for the default in question.

It may be remarked at this stage that at a later stage, the same author has observed as follows:

If he is satisfied about the existence thereof, in the course of the proceedings before him but does not issue the notice or initiate any step for imposing penalty, in the course of the proceedings before him, the requirements of Section 271(1) of the Act shall not be completely fulfilled.

6. The Department's answer is two fold In the first instance, it is contended that Section 275 of the Income Tax Act, 1961, is not intended to prescribe the stage after which penalty proceedings cannot be commenced nor does it prescribe any requirement regarding the commencement of the proceedings for the imposition of penalty. Reliance has been placed in this connection on *Navayuga Traders Gunnies Firm, Rajahmundry Vs. The Commissioner of Income Tax , Andhra Pradesh, Hyderabad*, It was next argued that for commencing proceedings for the imposition of penalty, actual issue of notice is not necessary. *Artisan Press Ltd. Vs. Income Tax Appellate Tribunal and Another*, was relied upon. In that case, it was held that the direction contained in the notes on record for the issue of notice u/s 28 of the Income Tax Act, 1922 amounted to commencement of the proceedings. It was further observed that "to initiate" means "to originate" or "to take the first step."

7. We have given our careful consideration to the passages relied upon by the learned Counsel for the assessee, but we are not prepared to hold on the basis of these passages that for commencing proceedings for the imposition of penalty, there should be actual issue of notice and a mere direction of the Income Tax Officer to issue notice is not sufficient to hold that there was a valid commencement of the proceedings. The learned author Kanga and Palkhivala

relied upon the decisions in *Sivagaminatha Moopnar & sons V.I.T.C.* and *Vir Bhan Bansilal v. C.I.T.* quoted above. In the former case the Madras High Court merely held that the proceedings for the levy of a penalty must be initiated by an authority when such authority is in action of the assessment or other proceedings in the course which it is found that the assessee has brought himself within the mischief of Section 28. Similarly, the Lahore High Court, in *Vir Bhan Bansilal's* case held that once the Income Tax Officer starts proceedings for imposition of penalty u/s 28 before the assessment has been finally made and the tax paid. The pointed controversy whether a mere direction to issue notice is sufficient or whether it should be followed by actual issue of notice to result in the commencement of the proceedings was not directly raised as in both these cases the penalty notice had already been issued before the assessment orders were made. The pointed controversy arose in the later Madras case, namely, *Artisan Press Ltd. v Income Tax Appellate Tribunal* and another (*supra*) and the view taken therein is contrary to the opinion expressed by Kanga and Palkhivala. The learned author A.C. Sampath Iyengar has given his own conclusions as to the combined effect of Sections 271, 274 and 275 of the Income Tax Act, 1961, and went to the extent of stating that even the proposal to levy penalty must be conveyed to the assessee before the completion of the assessment proceedings. The extreme view propounded by this author derives no support from any decision and is not acceptable. The earlier statement by the learned author Ramesh C. Sharma that initiation of the penalty proceedings has to be done by issue of a notice has not been adhered to as would appear from his later statement. In our opinion, the text books relied upon by Mr. Kakkar cannot advance his case. To arrive at a correct conclusion, it will be proper to revert to the cases on the point.

8. Considering the cases we find some divergence of legal opinion as to whether Section 275 of the Income Tax Act, 1961 prescribes any requirement regarding the imposition of penalty. The Bombay High Court in *MISS SAROJ NAYUDU Vs. APPELLATE ASSISTANT COMMISSIONER OF Income Tax, NAGPUR* and *ANOTHER.*, and the Gujarat High Court in *D.M Mansvi v. Commissioner of Income Tax, Gujarat* 72 ITR 17 have taken the view that Section 275 contemplates the commencement of the proceedings for imposition of penalty before the completion of the assessment proceedings. The Andhra Pradesh High Court however, has taken a different view in *Navayuga Traders Gunnies Firm's* case (*Supra*). According to the Andhra Pradesh High Court, Section 275 is absolutely intended to prescribe a limit of time within which penalty proceedings must be concluded. It is not intended to prescribe a stage after which the penalty proceedings cannot be commenced nor does the language of Section 275 lead to such a necessary implication. The words "in the course of which the proceedings for the imposition of penalty have been commenced" are merely descriptive of the proceedings, two years after completion of which penalty cannot be imposed. The words are used to identify the particular proceedings. We consider it unnecessary in the present case to express any firm view on this controversy

although we feel inclined to agree with the opinion expressed by the Andhra Pradesh High Court. In our opinion, the question can be answered on the other submission made by Mr. Bhandari. The question as to what amounts to the commencement of the proceedings should be in the ultimate analysis is a question of fact to be decided having regard to over-all consideration of the facts of the case and should not be answered in the abstract. Agreeing with the opinion expressed in Artisan Press Ltd.'s case (supra), we hold that the recording of satisfaction by the Income Tax Officer and a direction for the issue of a notice in the present case did amount to initiation for the commencement of the proceedings for the imposition of penalty. It is not necessary that the direction should be actually carried out by the ministerial officers to result in the initiation for the commencement of the proceedings. In this view we are supported by the view taken in D.M. Manasvi's case 72 ITR 17 and Durga Timber Works Vs. Commissioner of Income Tax, In the light of the aforesaid discussion, the question No. 1 is answered in the affirmative in favour of the Department.

9. The second question need not detain us long. After the reference, a similar question arose in Commissioner of Income Tax Vs. Shankerlal Naraindas, In that case, a Bench of this Court to which on c of us was a party, after reviewing a number of cases, held that the penalty to be imposed is to be calculated in accordance with the provisions of Section 271(1)(a)(i) of the Income Tax Act, 1961. Further, there has been an authoritative pronouncement of their Lordships of the Supreme Court in Jain Bros. and Others Vs. The Union of India (UOI) and Others, wherein it has been held that both Sections 271(1) and 297(2)(g) have to be read together and in harmony and so read the only conclusion possible is that for the imposition of a penalty in respect of any assessment for the year ending on March 31, 1962, or any earlier year which is completed after the first day of April 1962 the proceedings have to be initiated and the penalty imposed in accordance with the provisions of Section 271 of the Income Tax Act, 1961."

10. The learned Counsel for the assessee also frankly conceded that the question No 2 cannot but be decided in the negative in favour of the Department.

11. Accordingly, the question No. 1 is answered in the affirmative and the question No.2 in the negative. No order as to costs.