
(1990) 08 BOM CK 0054
In the Bombay High Court
Case No : Writ Petition No. 3566 of 1987

J. Rasiklal and Co.

APPELLANT

Vs

G.K. Mishra and others

RESPONDENT

Date of Decision : 08-08-1990

Acts Referred:

Income Tax Act, 1961 — Section 264, 271, 271(1), 273A

Citation : (1991) 188 ITR 591 : (1991) 57 TAXMAN 28

Hon'ble Judges : T.D. Sugla, J

Bench : Single Bench

Advocate : Mrs. Manjula Singh and G.S. Jetley, Y.P. Trivedi, Miss J.B. Patel and K.B. Bhujle, for the Appellant;

Judgement

T.D. Sugla, J.—By this petition under article 226 of the Constitution of India, the petitioner, a dissolved partnership firm, has challenged the legality and validity of the two orders passed by the Commissioner of Income Tax, Bombay City VI, Bombay (both dated August 18, 1987), under sections 264 and 273A of the Income Tax Act.

2. The assessment of the petitioner-company for the assessment year 1983-84 was completed on February 1, 1985. The petitioner, it is stated, had filed its return originally on November 2, 1983. It filed revised return on July 16, 1984. In the revised turn, an additional income of Rs. 3,16,000 was shown. Being of the view that the penal provision of section 271(1)(c) were attracted, the Income Tax Officer recorded a finding to the effect and, after allowing the petitioner an opportunity of being heard imposed, by order dated December 11, 1985, a penalty of Rs. 3,12,840 u/s 271(1)(c), being 150% of the amount of tax sought to be evade. The petition did not file any appeal against the order. Instead, it filed a revision petition before the Commissioner of Income Tax u/s 264 of the Act. It also made an application before the Commissioner u/s 273A for reduction or waiver of penalty so imposed by the Income Tax officer. By the impugned orders both dated August 18, 1987, the Commissioner rejected the petitioner's

revision petition u/s 264 as well as the application u/s 273A of the Income Tax Act.

3. Inviting the Court's attention to the fact that no affidavit-in-reply has been filed by the Department, Shri Trivedi, learned counsel for the petitioner, stated that the averment made in the petition remained uncontroverted. Referring then to paragraph 2 of the petition, he pointed out that a search was conducted in the petitioner's premises on June 15, 1982, during which cash of Rs. 3,16,000 was found and seized. The raiding party which was headed by a Deputy Director of Inspection (Intelligence) told the petitioner that if it offered that amount as the income of the current year, it could avoid levy of penalty. The petitioner was even given a challan for payment of advance tax to be adjusted against the said amount of Rs. 3,16,000 seized by the raiding party. The petitioner is said to have written to the Deputy Director of Inspection (Intelligence) on June 21, 1982, and to the Commissioner of Income Tax on June 22, 1982, admitting the said amount to be its income for the said year and necessary challan for advance tax also stated to have been filed.

4. Fairly admitting that the petitioner had not disclosed the said amount of Rs. 3,16,000 as its income in the first return filed for the assessment year 1983-84 on November 2, 1983, Shri Trivedi stated that that was due to a sheer mistake and that a revised return was filed by the petitioner on July 16, 1984, as soon as the mistake was realised. However, the revised return, it was stated, was filed long before the assessment was taken up by the Income Tax Officer. The submission, thus, is that it is a case of a bona fide mistake. In any event, the correct return was filed before the assessment was taken up by the Income Tax Officer and, therefore, the imposition of the penalty u/s 271(1)(c) was not justified.

5. Taking the court through the impugned orders, Shri Trivedi pointed out that the Commissioner has wrongly approached the question involved in the petitioner's revision petition u/s 264 and the application u/s 273A. The Commissioner, he stated, has taken the view that the concealment was detected when the search was conducted in the petitioner's premises on June 15, 1982. The assessment proceedings pertain to the assessment year 1983-84, the relevant previous year being S. Y. 2038, which is roughly from October, 1981, to September, 1982. Even the previous year itself had not ended when the search was conducted on June 15, 1982, in the petitioner's premises. The concealment, if any, according to Shri Trivedi, comes within the scope of section 271(1) only if the authority is satisfied during the course of the assessment proceedings that the provisions of section 271(1)(c) are attracted. This was the position u/s 271 as it then stood. The submission is that the Commissioner rejected the petitioner's revision petition u/s 264 and application u/s 273A by applying the provisions which did not exist at the material time. The Commissioner, he contended, thus, did not properly exercise jurisdiction vested in him.

6. Mrs. Singh, learned counsel for the Department, on the other hand, stated

that the orders passed by the Commissioner u/s 264 and u/s 273A are not appealable. The petitioner preferred to file a revision petition u/s 264 and an application u/s 273A before the Commissioner instead of filing an appeal before the Commissioner (Appeals). If it had filed an appeal before the Commissioner (Appeals), the petitioner could have gone in further appeal to the Tribunal if necessary and to this court by way of a reference. Having not done so, the petitioner cannot now complain. She pointed out that though the Commissioner has referred to the fact of raids, as a matter of fact, he has confirmed the penalty for reasons given by the Income Tax Officer in his order imposing penalty. The order u/s 264, according to her, cannot, therefore, be interfered with by this court. As regards the order u/s 273A the fact that the amount of Rs. 3,16,000 was found in the petitioner's premises during the course of search in June, 1982, is a relevant and material fact and the Commissioner was justified in placing reliance on it for rejecting the petitioner's application u/s 273A.

7. Relevant part of the provisions of section 273A reads as under :

"273A. (1) Notwithstanding anything contained in this Act, the Commissioner may, in his discretion, whether on his own motion or otherwise, - ...

(ii) reduce or waive the amount of penalty imposed or imposable on a person under clause (iii) of sub-section (1) of section 271; or

If he is satisfied that such person - ...

(b) in the case referred to in clause (ii), has, prior to the detection by the Income Tax Officer, of the concealment of particulars of income or of the inaccuracy of particulars furnished in respect of such income voluntarily and in good faith, made full and true disclosure of such particulars..."

8. The Commissioner has undoubtedly a discretion to reduce or waive the amount of penalty imposed or imposable u/s 271 (1)(c) in circumstances mentioned in clause (b) reproduced above. The Commissioner had to consider, in the first instance, whether the petitioner *t* in respect of such (Rs. 3,16,000) income, voluntarily and in good faith made full and true disclosure. For this purpose, it was necessary for him to take into account the facts such as :

(i) The petitioner had admitted the said amount of Rs. 3,16,000 as its income for the year on 21 and 22 June, 1982, when it wrote to D. D. I. and the Commissioner respectively about it and filed a challan for advance tax payable in respect thereof;

(ii) The revised returned for the year showing the correct income was filed on July 16, 1984, long before the proceedings for assessment were taken up by the Income Tax Officer; and

(iii) Explanation 5 in section 271, creating a fiction of concealment of income on the date of seizure of an amount in the course of search was introduced by the Taxation Laws (Amendment) Act, 1984, with effect from October 1, 1984.

9. Admittedly, the Commissioner has not considered the facts in the background of the correct legal position. He had proceeded on the assumption that the concealment of income was detected in June, 1982, and, therefore, the revised return filed in July, 1984, was not of much consequence. The logic of his order is that even if the petitioner had filed the first return showing the correct income, would have attracted the penal provisions of section 271(1)(c) as the concealment of income had been detected in June, 1982. He failed to consider that the proceedings before him were the proceedings for the assessment year 1983-84. The penal provisions of section 271(1) at the material time provided for assumption of jurisdiction for that purpose only if the Income Tax Officer, was satisfied during the course of assessment proceedings that the penal provisions of section 271(1)(c) were attracted. He should have examined whether the petitioner had filed the revised return which is stated to be the correct return before the assessment was taken up by the Income Tax officer for the purpose of completing the assessment and after the fact of concealment had come to the notice of the Income Tax Officer. If that was the fact, the Commissioner was bound to exercise discretion in the matter. It would, of course, be open to him to reduce or waive the penalty depending upon other relevant circumstances. But he certainly cannot refuse to exercise the power u/s 273A. To this extent, I am in agreement with Shri Trivedi that the Commissioner failed to exercise jurisdiction u/s 273A.

10. In the view taken about the application u/s 273A, it is not necessary to consider the legality and validity of the order passed u/s 264.

11. Having regard to the above discussion, the impugned order dated August 18, 1987, passed by the Commissioner of Income Tax u/s 273A of the Income Tax Act is quashed. The Commissioner is directed to consider the petitioner's application under that section afresh according to law.

12. Rule is accordingly made absolute in terms of prayer clause (a) excluding the impugned order dated August 18, 1987, passed by him u/s 264.

13. No order as to costs.