

(1985) 05 PAT CK 0025
In the Patna High Court
Case No : Taxation Case No. 180 of 1976

Jamunadas Mannalal

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 20-05-1985

Acts Referred:

Income Tax Act, 1961 — Section 139, 256(1), 271(1)(a)

Citation : (1986) 54 CTR 417 : (1987) 164 ITR 66 : (1987) 30 TAXMAN 5

Hon'ble Judges : Uday Sinha, J; Nazir Ahmad, J

Bench : Division Bench

Advocate : Rameshwar Prasad No. 2 and O.P. Agrawal, for the Appellant; B.P. Rajgarhia and S.K. Sharan, for the Respondent

Judgement

Nazir Ahmad, J.—A statement of the case has been submitted by the Income Tax Appellate Tribunal, Patna Bench "A", Patna (hereinafter referred to as "the Tribunal"), u/s 256(1) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), referring the following questions of law for the opinion of this court:

"1. Whether penalty u/s 271(1)(a) could be imposed even after charging interest u/s 139 for delayed submission of the return ?

2. Whether, on the facts of the case, the penalty calculated on the basis of tax on an unregistered firm could be levied in this case when no tax was payable by it as a registered firm?"

The facts of the case may be culled out from the statement of the case. For the assessment year 1967-68, the return of income was due on June 30, 1967, but the return was filed on September 3, 1968. The Income Tax Officer initiated penalty proceedings u/s 271(1)(a) of the Act for delayed filing of the return without reasonable cause. It was contended on behalf of the assessee before the Income Tax Officer that when interest had been charged for late filing of the return, penalty should not be imposed. It was also argued on behalf of the assessee that since the Department has charged interest, it might be presumed

that the time was extended for filing the return and consequently no penalty proceedings would lie. It was further submitted that if at all the default was to be considered, it would be up to the date of issue of notice u/s 139(2) of the Act. It was also submitted before the Income Tax Officer that no tax was due from the assessee during the assessment year in question as a substantial amount was due to it as refund for the earlier years and as such the proceeding u/s 271(1)(a) was not maintainable. The Income Tax Officer held that no application was made by the assessee asking for extension of time for filing his return and the assessee had not been able to show that he was prevented by sufficient cause from filing the return. The Income Tax Officer, therefore, imposed a penalty of Rs. 6,264 from the due date of filing the return up to the date of filing the return. A copy of the order of the Income Tax Officer has been annexed and marked as annexure "A" forming part of the statement of the case.

2. The assessee appealed before the Appellate Assistant Commissioner. The Appellate Assistant Commissioner agreed with the Income Tax Officer that there can be no presumption in law that if interest is charged u/s 139 of the Act, the Income Tax Officer will be deemed to have extended the time-limit for filing the return of income. It was contended before the Appellate Assistant Commissioner on behalf of the assessee that a general extension of time was granted for the assessment year 1967-68 up to August 15, 1967, for filing the return of income. The Appellate Assistant Commissioner accepted this contention and he, accordingly, held that the period of default should be reckoned from August 16, 1967. The Appellate Assistant Commissioner also directed that if the assessee has paid advance tax, then the same should be adjusted in order to determine the tax payable as an unregistered firm according to law. With this modification, the penalty was confirmed. A copy of the order of the Appellate Assistant Commissioner has been annexed and marked as annexure "B" forming part of the statement of the case.

3. The assessee then appealed before the Appellate Tribunal and the same arguments were advanced before the Tribunal as were advanced before the Income Tax Officer. The Tribunal found that the assessee had not pleaded existence of any reasonable cause for delay in filing the return. It was only submitted before the Tribunal that the interest having been charged, the penalty should not have been imposed. It was also submitted that the tax payable as a registered firm was Rs. 2,742 whereas the advance tax paid was Rs. 3,500. It was also submitted before the Tribunal that for calculating the penalty, the tax as on a registered firm should be taken and not the tax as on an unregistered firm. The Tribunal took the view that the charging of interest u/s 139 and imposition of penalty u/s 271(1)(a) are two independent provisions and one does not exclude the other. The Tribunal also took the view that the purpose of both the provisions is different and whereas interest has to be charged wherever there is delay in the filing of the return, the question of penalty arises only if there is no reasonable cause for the delay in the filing of the return. The Tribunal agreed with the finding of the Appellate Assistant Commissioner. The Tribunal also considered the

plea of the assessee that the tax should be calculated on the basis that the firm was a registered firm. The Tribunal held that if there is delay in filing the return without any reasonable cause, then the provisions of Section 271(1)(a) of the Act are attracted and the quantum of penalty has to be decided by looking into the provisions of law which clearly require that in the case of a registered firm, the calculation has to be on the basis that the firm is an unregistered firm and so this contention of the assessee was also rejected. The Tribunal, therefore, dismissed the appeal of the assessee. A copy of the order of the Tribunal has been annexed and marked as annexure " C " forming part of the statement of the case.

4. The facts are thus not disputed. For the assessment year 1967-68, the return was due on June 30, 1967, but a general extension was allowed for the assessment year up to August 15, 1967, and so the default u/s 139(1) started on August 16, 1967, but the return was filed on September 3, 1968. It is also not disputed that the return was not filed even in pursuance of a notice u/s 139(2) of the Act and that the assessee did not file any application for extension of time for filing the return. On these facts, it has to be held that the return filed by the assessee was a return u/s 139(4) of the Act. From the statement of facts, at page 7 of the paper book, it appears that the amount of interest charged from the assessee was Rs. 1,845.

5. Section 139(4) of the Act as it stood in the assessment year 1967-68, was as follows :

"Any person who has not furnished a return within the time allowed to him under Sub-section (1) or Sub-section (2) may before the assessment is made furnish the return for any previous year at any time before the end of four assessment years from the end of the assessment year to which the return relates and the provisions of Sub-clause (iii) of the proviso to Sub-section (1) shall apply in every such case."

Thus in the assessment year 1967-68, if the assessee filed the return u/s 139(4) of the Act, he was liable to pay interest. According to Sub-clause (iii) of the proviso to Sub-section (1), the Income Tax Officer was entitled to charge interest even if no application for extension was filed. Thus, the Income Tax Officer could charge interest for the late filing of the return u/s 139(4) of the Act.

6. Now, keeping this legal position and the facts of the case in view, I have to consider the various decisions cited before us in this case.

7. Mr. Rameshwar Prasad No. 2, the learned advocate for the assessee, relied on the case of Commissioner of Income Tax, Andhra Pradesh Vs. M. Chandra Sekhar, In this decision, the Tribunal held that as the Income Tax Officer had levied interest up to the date of the filing of the return, it must be presumed that the Income Tax Officer had extended the time for filing the return after satisfying himself that it was a case for extension of time. Therefore, their Lordships of the Supreme Court agreed with this contention of the assessee. However, at page

439, their Lordships have clearly pointed out that, in that case, the extension was a matter falling within Sub-section (1) of Section 139 and the returns furnished by the assessee must be attributed to that provision and that they were not returns furnished within the contemplation of Sub-section (4) of Section 139 and so they held that the various decisions quoted on page 439 cannot be invoked in the instant case as they were cases dealing with a return filed in the circumstances mentioned in Sub-section (4) Section 139. Thus, their Lordships of the Supreme Court have made a distinction that in cases in which the return is filed u/s 139(4) of the Act, the presumption cannot be drawn.

8. In the present case, it is the consistent finding of the courts below that the assessee never filed any application for extension of time. Thus, the question which has to be considered is as to whether penalty u/s 271(1)(a) of the Act can be levied if interest is charged.

9. There are various decisions to the effect that if a delayed return is filed u/s 139(4), then interest can be charged and the charging of the interest will not prevent the Department from levying penalty.

10. In this connection, it has been held in the case of *Express Newspapers (P.) Ltd. Vs. Income Tax Officer, Administration and Collection and Another*, by the Madras High Court that when the statute provides a time-limit for filing a return, it can also provide a penalty for non-submission of the return in time and in addition the statute can also provide as a compensatory measure that the interest should also be paid on the amount of tax for the period of delay and, therefore, the provision for payment of penalty as well as interest for the delayed submission of return cannot be said to offend any constitutional provision. In this case, for the assessment years 1960-61, 1961-62 and 1962-63, the returns were filed after a delay of 26, 18 and 31 months, respectively. Thus, in all these cases, the returns were filed after a great delay and in those circumstances, these observations were made.

11. It has been held in the case of *T. Venkata Krishnaiah and Co. Vs. Commissioner of Income Tax*, by the Andhra Pradesh High Court that the Income Tax Officer was competent to levy penalty u/s 271(1)(a) of the Act although he had levied interest under Clause (iii) of the proviso to Section 139(1) as the imposts are different and distinct and they have been provided to meet different situations and contingencies and that the mere fact that under the Act the assessee can file the return before the assessment is made or a revised return at any time before the assessment is made does not absolve the assessee from the levy of penalty under Clause (a) of Sub-section (1) to Section 271. In this case, the application for extension of time was not received by the Income Tax Officer on or before September 16, 1963, within which time the assessee was required to file his return as per the notice under Sub-section (2) of Section 139, and so it was held that the Income Tax Officer was not bound under the provisions of the Act or any Rules made thereunder to pass any order thereon.

12. It has been held in the case of *Narandas Paramanand Das Vs. Income Tax Officer and Others*, , by the Calcutta High Court that the Legislature has made a distinction between the interest which is payable u/s 139, proviso (iii) of the Act where the return is not filed within the statutory time or within the time as extended by the Income Tax Officer and the penalty which is leviable u/s 271, only if the Income Tax authority is satisfied that without reasonable cause the assessee failed to furnish the return of the total income within the time prescribed and that the provision for the calculation of the interest is not of the nature of penal interest and a penalty proceeding is quite a different proceeding and the levy of interest will not prohibit the levy of penalty and that penalty .can be levied even if the return is filed before the assessment is made but after the prescribed time.

13. It has also been held in the case of *D.B. Navalgundkar and Co. Vs. Commissioner of Income Tax, Mysore*, , by the Karnataka High Court that there is nothing in the Act to indicate that Section 139 of the Act prescribing the interest to be charged, and Section 271(1)(a) prescribing the penalty to be levied for delay in submission of a return are alternative and not cumulative and, therefore, it is competent on the part of the Income Tax Officer to levy penalty u/s 271(1)(a) of the Act even where the interest has been charged u/s 139 of the Act.

14. It has been held in the case of *Kerala Tile and Clay Works Vs. Commissioner of Income Tax*, , by the Kerala High Court that for failure to file a return in time as required in Section 139(1), penalty can be imposed as well as penal interest and that what is levied u/s 271(1)(a) is penalty for the default and attempted evasion of tax and that it is a punishment for the failure of the assessee to comply with the statutory duty imposed by Section 139(1) of the Act and it is deterrent in character. It has also been held in this decision that the liability to pay the interest arises u/s 139 and, no doubt, the two consequences arise out of the same default and that one is compensatory and the other punitive and that each is complementary to the other and both are provided for by the Act. In this case also, the returns were filed u/s 139(4) of the Act and so the interest was charged in view of the then existing provision u/s 139(4) read with the proviso (iii) to Section 139(1) of the Act.

15. Thus it is evident that if a return is filed u/s 139(4) of the Act, then by virtue of Section 139(4) as it was in existence in 1967-68, interest has to be charged in view of Sub-clause (iii) of the proviso to Section 139(1) and the question of any presumption in such a case does not arise specially when there is clear material in this case to show that the assessee never filed any application for extension of time and so the question of presumption, that as the interest has been charged, the extension should be deemed to have been allowed, does not apply in this case.

16. Their Lordships of the Supreme Court have referred to the case of *Metal India Products, Hathras Vs. The Commissioner of Income Tax, Lucknow*, , which

is a Full Bench decision of the Allahabad High Court. But in this case, the only question involved was whether the return filed u/s 139(4) of the Act can be treated as a return filed within the time prescribed in Section 139(1) or the time given in Section 139(2), and it was held, for the purpose of penalty, that the filing of the return within time prescribed by Sub-section (4) cannot be treated as a return filed within the time prescribed by Sub-section (1) and if the time prescribed by Sub-section (1) or (2) passes, default takes place, attracting liability to penalty. In this decision, the question of charging interest was not considered. Similar has been the finding in the case of Commissioner of Income Tax Vs. Gangaram Chapolia, , which is a decision of the Full Bench of the Orissa High Court, Thus, these two decisions are not helpful to the question before us.

17. A similar question was referred to this court by the Tribunal, "B" Bench, Patna, as question No. 1, which was to the effect whether penalty u/s 271(1)(a) could be imposed even after charging interest u/s 139 of the Act for the delayed submission of the return. The Full Bench of this court, in the case of Jamunadas Mannalal Vs. Commissioner of Income Tax, , held that when a return is filed u/s 139(4), then interest can be charged and so question No. 1 was not pressed by the learned advocate for the assessee, Mr. K.N. Jain, before us and he submitted that question No. 1 should be referred by the Tribunal and, accordingly, the question was answered against the assessee and in favour of the Revenue. Their Lordships of the Supreme Court have clearly laid down that the cases covered by Section 139(4) were not dealt with in Commissioner of Income Tax, Andhra Pradesh Vs. M. Chandra Sekhar, , as is mentioned at page 439 thereof.

18. In view of my discussions above, I hold that the Tribunal was justified in holding that penalty u/s 271(1)(a) of the Act can be imposed even after charging interest u/s 139 of the Act for the delayed submission of the return.

19. Question No. 2 is whether on the facts of the case, penalty calculated could be levied in this case when no tax was payable by it as a registered firm. The statement of facts at page 7 of the paper book go to show that the assessee paid advance tax of Rs. 1,750 on October 5, 1966, and another instalment of advance tax of Rs. 1,750 on January 25, 1967. Thus, the assessee paid advance tax of Rs. 3,500 and the assessed tax as registered firm against the assessee was Rs. 2,742. The assessee is a registered firm. Thus, it cannot be doubted that as a registered firm, advance tax paid was in excess of the assessed tax. Question No. 2 in the present case was question No. 3 in the case of Jamunadas Mannalal Vs. Commissioner of Income Tax, , which is a Full Bench decision of this court. The Full Bench held that the penalty calculated on the basis of tax as on an unregistered firm could be levied in this case when no tax was payable by it as a registered firm. Question No. 3 was answered in favour of the Revenue and against the assessee, for the reasons discussed by the Full Bench of this court. I, therefore, hold that on the facts of this case, penalty calculated on the basis of tax as on an unregistered firm could be levied in this case when no tax was payable by it as a registered firm.

20. In view of my findings above, both the questions are answered in the affirmative and in favour of the Revenue and against the assesses. In the circumstances of the case, however, there will be no order as to costs.

Uday Sinha, J.

21. I agree.