

(1988) 07 BOM CK 0010

In the Bombay High Court

Case No : Special Civil Application No. 1431 of 1979

Laxman

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 01-07-1988

Acts Referred:

General Clauses Act, 1897 — Section 2(22)

Income Tax Act, 1961 — Section 139, 139(2), 139(8), 140A, 148

Wealth Tax Act, 1957 — Section 18(2A)

Citation : (1989) 42 TAXMAN 47

Hon'ble Judges : V.A. Mohta, J;H.D. Patel, J

Bench : Division Bench

Advocate : C.J. Thakkar, for the Appellant; A. Shelat, for the Respondent

Final Decision : Allowed

Judgement

Mohta, J.—The petitioner, Laxman Joshi, was a clerk in Savatram Mills, Akola. On 9-9-1974 he filed returns of his income for the assessment years 1968-69 to 1975-76, prior to the issuance of a notice to him u/s 139(2) of the income tax Act, 1961 ("the Act"). The assessment for the assessment year 1974-75 was completed on 24-4-1977 and for the rest of the years on 10-3-1978. All the returns excepting for the assessment years 1972-73 and 1973-74 were accepted by the ITO. For the assessment years 1972-73 and 1973-74, the valuation of the building then under construction shown in the returns was not accepted due to the different valuation made by the authorised surveyor. Some additions were made only on that basis. In appeals, some relief was granted. No penalty proceedings for concealment of income were initiated u/s 271(1)(c) of the Act. But, for late filing of the return and for not filing the estimate of advance tax, penalty proceedings, respectively, under sections 271(1)(a) and 273(1)(b) of the Act were initiated. The petitioner made an application to the Commissioner (respondent) u/s 271(4A) on 15-9-1974. After section 273A replaced section 271, another application under the new provision was made on 27-11-1978. These applications were made for exercise of discretion to reduce or waive the penalty

imposed or imposable u/s 273A(1)(i) and to reduce or waive the amount of interest paid or payable u/s 139(8), for late filing of the income tax returns and u/s 217 for not filing estimates of advance tax. The Commissioner, by order dated 3-12-1978 (Annexure 3), refused to exercise the discretion vested in him by section 273A on the ground that the income tax returns were not filed "voluntarily" as contemplated by section 273A(a) and (c) and as a result, the conditions precedent for exercise of discretion were not satisfied. The substance of the order is that the Inspector had visited the new building in the course of survey operations and the returns were filed as a consequence of fear of detection and follow-up action, which were bound to follow. By this petition, the said order is impugned on the ground that the Commissioner has misdirected himself with regard to the scope of the conditions precedent for the exercise of jurisdiction. Some basic facts may be stated. The petitioner was drawing an annual salary of Rs. 5,327 from the S.R. Mills. On 18-3-1968 he purchased a plot of land in Akola for a consideration of Rs. 7,000 and thereafter gradually started construction of a house thereon which continued till the end of March 1975, the major portion having been constructed during the assessment years 1972-73 and 1973-74. In the returns, he showed additional income from "Bhikshuki" and agriculture. He paid income tax to the tune of Rs. 31,821 u/s 140A of the Act on the returned income and fully co-operated with the department in the assessment proceedings. According to him the reason for the late filing of the returns was his mistaken but bona fide impression that the obligation to file a return arises only when a notice is received from the income tax Department.

2. In this petition it is contended, as was contended before the Commissioner, that in case the discretion vested u/s 273A is not exercised, the petitioner's liability to pay penalty and interest could go to the extent of Rs. 1 lakh and considering his status in life and the fact of his retirement, it would cause great and untoward hardship to him. Referring to the observation of the Commissioner that the returns were filed after the Inspector visited the assessee's premises and made inquiries about the source of funds, the petitioner has denied the fact of any visit or inquiry. He sought information about the date of visit and the date and nature of the report. According to him, his case was prejudiced as no opportunity was given to him to meet that ground. The Commissioner has filed the return of the petitioner and has not disclosed any information sought for in the petition. It is not disputed that (i) the returns were accepted with minor variations, (ii) they were filed before issuance of the notice u/s 139(2) or section 148 of the Act, (iii) the petitioner fully paid the taxes on the returned income, and (iv) he fully co-operated in the assessment proceedings.

3. Section 273A reads thus :

273A. Power to reduce or waive penalty, etc., in certain cases.--(1) Notwithstanding anything contained in this Act, the Chief Commissioner or Commissioner may, in his discretion, whether on his own motion or otherwise,--

(i) reduce or waive the amount of penalty imposed or imposable on a person

under clause (i) of sub-section (1) of section 271 for failure, without reasonable cause, to furnish the return of total income which he was required to furnish under sub-section (1) of section 139; or

(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

(iii) reduce or waive the amount of interest paid or payable under subsection (8) of section 139 or section 215 or section 217 or the penalty imposed or imposable u/s 273,

if he is satisfied that such person--

(a) in the case referred to in clause (i), has, prior to the issue of a notice to him under sub-section (2) of section 139, voluntarily and in good faith made full and true disclosure of his income;

(b) in the case referred to in clause (ii), has, prior to the detection by the Assessing 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;

(c) in the cases referred to in clause (iii), has, prior to the issue of a notice to him under sub-section (2) of section 139, or where no such notice has been issued and the period for the issue of such notice has expired, prior to the issue of notice to him u/s 148, voluntarily and in good faith made full and true disclosure of his income and has paid the tax on the income so disclosed,

and also has, in all the cases referred to in clauses (a), (b) and (c), cooperated in any enquiry relating to the assessment of his income and has either paid or made satisfactory arrangements for the payment of any tax or interest payable in consequence of an order passed under this Act in respect of the relevant assessment year.

Explanation : For the purposes of this sub-section, a person shall be deemed to have made full and true disclosure of his income or of the particulars relating thereto in any case where the excess of income assessed over the income returned is of such a nature as not to attract the provisions of clause (c) of sub-section (1) of section 271.

(2) Notwithstanding anything contained in sub-section (1),--

(a) if in a case the penalty imposed or imposable under clause (i) of sub-section (1) of section 271 or the minimum penalty imposable u/s 273 for the relevant assessment year, or, where such disclosure relates to more than one assessment year, the aggregate of the penalty imposed or imposable under the said clause or of the minimum penalty imposable under the said section for those years, exceeds a sum of one hundred thousand rupees, or

(b) if in a case falling under clause (c) of sub-section (1) of section 271, the

amount of income in respect of which the penalty is imposed or imposable for the relevant assessment year, or, where such disclosure relates to more than one assessment year, the aggregate amount of such income for those years, exceeds a sum of five hundred thousand rupees,

no order reducing or waiving the penalty under sub-section (1) shall be made by the Chief Commissioner or Commissioner except with the previous approval of the Board.

(3) Where an order has been made under sub-section (1) in favour of any person, whether such order relates to one or more assessment years, he shall not be entitled to any relief under this section in relation to any other assessment year at any time after the making of such order.

(4) Without prejudice to the powers conferred on him by any other provision of this Act, the Chief Commissioner or Commissioner may, on an application made in this behalf by an assessee, and after recording his reasons for so doing, reduce or waive the amount of any penalty payable by the assessee under this Act or stay or compound any proceeding for the recovery of any such amount, if he is satisfied that--

(i) to do otherwise would cause genuine hardship to the assessee, having regard to the circumstances of the case; and

(ii) the assessee has co-operated in any enquiry relating to the assessment or any proceeding for the recovery of any amount due from him :

Provided that where the amount of any penalty payable under this Act or, where such application relates to more than one penalty, the aggregate amount of such penalties exceeds one hundred thousand rupees, no order reducing or waiving the amount or compounding any proceeding for its recovery under this sub-section shall be made by the Chief Commissioner or Commissioner except with the previous approval of the Board.

(5) Every order made under this section shall be final and shall not be called into question by any court or any other authority.

4. It is plain that in view of the absence of initiation of penalty proceedings for concealment of income u/s 271(1)(c), clause (5) of sub-section (1) of section 273A is not attracted in this matter, and that the word "detection" is to be found only in clause (b) and not in the relevant clauses (a) and (c).

5. The impugned order is short and the material portions are :

The returns were doubtless filed prior to the issue of notices u/s 139 or 148, but they cannot be considered voluntary... The assessee filed the returns only after the Inspector visited the assessee's premises and made enquiries about the source of funds... The filing of the returns was in consequence of fear of detection and follow-up action which was bound to follow.

6. It was vehemently contended by Shri Thakkar, the learned counsel for the petitioner, that under the circumstances, the Commissioner had mixed up the issues and that the concept of detection is altogether foreign to cases governed by clause (a) or (c). The submission is too specious to be accepted, for, in our view, though the said expression is not used in the two clauses, it can have some relevance to the expression "voluntarily and in good faith, made full and true disclosure of his income" used in those clauses.

7. Dissection of section 273A(1) will indicate that the following are the conditions precedent for the exercise of the discretion :

- (a) voluntary disclosure of income before issuance of notice u/s 139(2);
- (b) making of full and true disclosure of the income in good faith;
- (c) co-operation in the conduct of income tax assessment proceedings;
- (d) payment or satisfactory arrangement for payment of tax or interest payable in consequence of an order passed with respect to the relevant assessment year.

8. Undisputedly there is no grievance about fulfilment of conditions (c) and (d). There is no reference to non-fulfilment of condition (b) in the impugned order though during the course of hearing, a passing reference to it is made before us. Assuming that this condition can be relied upon by the respondent for the first time before us to support the conclusion, it seems to us that it cannot be attracted. The Explanation to section 273A(1) clarifies that if section 271(1)(c) is not attracted, the assessee shall be deemed to have made a full and true disclosure of income. The same approach will be necessary even in the case of interest u/s 273A(1)(iii) though the concept of penal interest and the concept of penalty are not the same. The scheme is that mere difference between the income returned and income assessed does not attract penalty and, therefore, is no ground to hold that there is no full and true disclosure for the purposes of section 273A. The term "good faith" is not defined under the Act but is defined u/s 2(22) of the General Clauses Act, 1897. Either under the General Clauses Act or in ordinary parlance, an act done in good faith means an act done honestly even if it is tainted with negligence or mistake. All that is required is that disclosure of income must be full and true according to the honest belief of the assessee. Applying the said test to the case at hand, it cannot be said that disclosure of income was incomplete and untrue to the knowledge of the assessee. All his returns are accepted. Variation has been mainly in the valuation of the new construction. Is the very late filing of the return indicative of absence of good faith ? The answer will have to be in the negative considering the purpose of the provision, viz., to tempt people to disclose concealed income by giving the incentive of waiver or reduction of incurred penalty and/or interest.

9. We now turn our attention to the most important facet of the case, viz., voluntary nature of the disclosure. "Voluntary" means "without compulsion". What was the compulsion in the instant case ? The so-called visit of the Inspector

to the house in the course of general survey operations. In the first place, there is no material whatsoever to come to the conclusion that any Inspector visited the petitioner's premises and made inquiries about the source of funds with which the building was being constructed. The petitioner denied this event and in the petition has asked for particulars. No particulars whatsoever are supplied even to us. But, very fairly, the whole file has been placed before us for perusal. We do not find any such material. There is, no doubt, a report of the Inspector, dated 4-10-1974, on record but it is with reference to the income disclosed by the petitioner on 9-9-1974, on the basis of which mandatory notice u/s 139(2) was issued by the Assessing Officer, on receipt of which the petitioner gave a letter stating that the returns filed be treated as filed in pursuance of the notices. Shri Shelat, the learned counsel for the respondent, was unable to make any statement on the aspect of the so-called visit of the Inspector.

10. Assuming that some Inspector did visit the premises of the petitioner and made inquiries about the source of funds, it is difficult to come to the conclusion that such visit and the inquiry by itself amounted to compulsion or constraint on the petitioner to file the returns due to fear of detection and inevitable follow-up action. The petitioner had placed reliance on the case of JAKHODIA BROTHERS Vs. COMMISSIONER OF Income Tax AND ANOTHER., . The basic facts of that case were that while the assessment process was going on for the subsequent years, returns for the earlier years were filed, but without any notice by the ITO. The question arose whether, in a situation of this type it could be said that the filing of the return was not a voluntary act but was a result of compulsion. The Allahabad High Court answered the question in the negative. The facts in the case of A.N. Sarvaria Vs. Commissioner of Wealth Tax, Delhi I and another, decided by the Delhi High Court are nearer to the facts obtaining in the instant case. That case is no doubt u/s 18(2A) of the Wealth-tax Act, 1957, but that section and section 273A of the Act are in pari materia. Returns of wealth for the assessment years 1965-66 to 1970-71 were filed in December 1970. The assessee had come up for survey during the course of survey operations carried out by the department in respect of agricultural properties and the survey report was submitted to the WTO seven days before the returns were filed. Repelling the contention of the department that the returns were filed under constraint of detection and, therefore, not voluntary, it was observed :

In the facts and circumstances of the present case, it cannot be held that merely because there was a survey of agricultural properties showing that the petitioner also owned agricultural land, he was under a "constraint" to make full disclosure of his net wealth. Further, the survey report cannot, in my view, be equated with seizure of books of account of the assessee from search of his premises. The returns for the years 1965-66 to 1970-71 were filed without notice. The petitioner had made full disclosure of his net wealth. The authorities did not detect any concealment therein and, therefore, it has to be held that the returns for the said assessment years were voluntary." (p. 809)

We have our respectful concurrence to the above approach. The Gujarat High Court has gone to the extent of holding that even if returns are filed at the behest of the officer during the course of assessment of income, it cannot be said to be involuntary only on that count --See Madhukar Manilal Modi Vs. Commissioner of Wealth Tax, Gujarat-V, and Another, and Him Singh v. CWT [1982] 134- ITR 438 (Punj. & Har.).

The case of JAKHODIA BROTHERS Vs. COMMISSIONER OF Income Tax AND ANOTHER., was brought to the notice of the Commissioner but; distinguishing the ratio, it was said :

In that case, the assessee had made a disclosure petition to the department before issue of notice u/s 148 by the ITO. Hence, the Court considered the disclosure as voluntary while in this case as explained above, the disclosure was not voluntary.

We find some difficulty in appreciating what the learned Commissioner intended to convey. The portion quoted above means that as the disclosure was before issuance of the notice u/s 148, the return filed was voluntary. The same situation obtains in the case at hand. On that aspect, there is no difference whatsoever.

The Commissioner has placed reliance on the case of Mool Chand Mahesh Chand Vs. Commissioner of Income Tax and Another, in holding the returns to be involuntary. That is a decision of the same Bench of the Allahabad High Court which decided Jakhodia Bros." case (supra) within a short period of nearly one month. The basic facts in the case of Mool Chand Mahesh Chand's case (supra) are altogether different and present no similarity whatsoever to the facts in the case at hand. The assessee was assessed to income tax for the assessment year 1964-65. He did not file returns in respect of the assessment years 1965-66 to 1968-69, but filed returns for the assessment years 1969-70 and 1970-71. The ITO required the assessee to file details with respect to various matters specified, viz., details of capital account and profit and loss account for 1963-64. It was thereafter that fresh and revised returns were filed and in the orders of assessment penalty u/s 271(1)(c) for concealment of income was proposed. The Allahabad High Court rightly held that the returns were filed not voluntarily but under constraint of detection and follow-up action which were bound to follow.

On behalf of the respondent, it was contended that the power u/s 273A is purely discretionary in character and, under the circumstances, no interference in writ jurisdiction is called for. We find it difficult to accept this contention. Once the conditions required for exercise of discretion in any judicial or quasi-judicial proceedings are satisfied, exercise of discretion cannot be either arbitrary or capricious and has to be judicious and objective. When the power is given to a public authority for being used for the benefit of a class of persons and the conditions precedent for the exercise are well-defined, there is a duty to exercise such power and on failure to perform that duty, courts are not only empowered but are duty bound to interfere. In the instant case, refusal to exercise discretion

is for no other reason than misconception of the scope of the power and, hence, writ of mandamus can be issued directing the Commissioner to entertain the application and to proceed to exercise the discretion within the limits specified by law.

Is pendency of a regular appeal against an order of penalty or interest a bar to the exercise of power u/s 273A is the next question. Having regard to the non obstante clause, "Notwithstanding anything contained in this Act" and the provision to exercise the power even suo motu, the inevitable answer is "no". Moreover, the power to impose penalty vested in the ITO and the power of the Commissioner to waive or reduce it have different complexions. Our attention was drawn on behalf of the respondent to a single Bench decision of this Court in the case of Purshottam Thackersey Vs. K.N. Anantarama Ayyar, Commissioner of Wealth-tax and another, . The said decision under the Wealth-tax Act, 1957, is rendered against an altogether different background and it does not lay down that the Commissioner is powerless to exercise the discretion where the question of penalty is pending or is decided in regular appeal.

Under the circumstances, the petition is allowed and the impugned order is quashed and set aside. It is held that the conditions mentioned in section 273A for exercise of discretion do exist. The matter is remanded to the Commissioner to decide the application u/s 273A on merits. Rule made absolute in the above terms. There shall be no order as to costs.