

(1985) 06 GUJ CK 0017
In the Gujarat High Court

Case No : Income-tax Reference No. 21 of 1977

Liberal Engineering Works

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 20-06-1985

Acts Referred:

Income Tax Act, 1961 — Section 139, 139(1), 139(4), 139(8), 271(1)

Citation : (1985) 48 CTR 154 : (1986) 158 ITR 520

Hon'ble Judges : D.H. Shukla, J;B.K. Mehta, J

Bench : Division Bench

Advocate : K.C. Patel, for the Appellant; S.N. Shelat, for the Respondent

Judgement

B.K. Mehta, J.—The following question is referred to us at the instance of the assessee for our opinion u/s 256(1) of the Income Tax Act,

1961 :

Whether. on the facts and in the circumstances of the case, the Tribunal was justified in law. in holding that the penalty u/s 271(1)(a) of the Income

Tax Act, 1961, was rightly imposed on the registered firm even when it had paid excess advance tax ?

2. A few facts need be noticed in order to appreciate the dispute between the assessee and the Revenue in this reference. The assessment year

under reference is 1968-69 and the assessee was required to file a return of income by June 30, 1968. The said return was filed on November 10,

1970, though in the statement of the case, it has been stated to be November 10, 1971. However, having regard to the date of the order of

assessment wherein the correct date has been stated, we have, with the consent of the parties, taken this date of filing the return as November 10,

1970. The assessee returned an income of Rs. 51,759. It is common ground that the assessee had paid interest u/s 139(8) till the date of filing of the return. However, in view of the delay in filing the return, the Income Tax Officer initiated action for levy of penalty u/s 271(1)(a) of the said Act. In reply to the show-cause notice issued by the Income Tax Officer, the assessee contended that the firm of which he was a partner was a registered firm which had already paid advance tax, and the assessment has resulted in the refund, and as such there was no default or for that matter any contumacious conduct. This plea of the assessee did not commend itself to the Income Tax Officer, who imposed a penalty of Rs. 9,000.

3. In appeal to the Appellate Assistant Commissioner, the same contention was reiterated on behalf of the assessee, who accepted the appeal and canceled the order of penalty. The Income Tax Officer carried the matter in appeal before the Tribunal which was of the opinion that the question was no more res integra, and having regard to the decision of this court in CIT v. Damjibhai and Brothers (income tax Reference No. 44 of 1974, decided on September 22/23, 1975), the penalty was rightly imposed by the Income Tax Officer. The appeal of the Department was allowed and the order of the penalty was restored. It is in these circumstances that the assessee has prayed for a reference which has been granted.

4. At the time of hearing of this reference, two contentions were urged by the learned advocate for the assessee. In the first place, he submitted that the Tribunal was clearly in error in law inasmuch as it has proceeded on a short ground that the question is covered by the decision of this court in Damjibhai and Brothers" case, which was not a case of payment of advance tax by the said firm and it was a case of tax to be paid on the self-assessment by the assessee. In the second place, the learned advocate urged that having regard to the latest decision of the Supreme Court in Commissioner of Income Tax, Andhra Pradesh Vs. M. Chandra Sekhar, , there is a legal presumption that the time for filing the return was deemed to have been extended on the payment of the interest under proviso to sub-section (l) of section 139 and, therefore, there was no question of any delay in filing the return and the condition precedent for invoking the power to levy penalty u/s 271(1)(a) was not satisfied and, therefore,

also the Tribunal has committed an error of law.

5. We are of the opinion that this reference should be allowed obviously on the second contention which has been urged. As stated above, it is not

in dispute between the parties that the assessee was charged penal interest for the period up to the date of filing of the return. In Commissioner of

Income Tax, Andhra Pradesh Vs. M. Chandra Sekhar, , the facts were that the assessee-respondent had filed voluntary returns of income for the

assessment years 1959-60 to 1962-63 on August 2, 1963, and that for the assessment year 1963-64 on August 2, 1964. The Income Tax Officer

had levied interest up to the date of filing of the return and also imposed penalty u/s 271(1)(a). The Tribunal held that the assessee had given his

reasons for the delay in filing the returns for the purposes of both levy of interest u/s 139(1) and also for levy of penalty u/s 271(1)(a), and that as

the Income Tax Officer had levied the interest up to the date of filing of the returns, it must be presumed that the Income Tax officer had extended

the time for filing returns after satisfying himself that it was a case for extension of time, and cancelled the penalties. On a reference, the High court

held that the Tribunal was justified in relying upon the presumption that official acts had been regularly performed and that, therefore, it must be

presumed that the Income Tax Officer had extended the time upon grounds made out by the assessee because otherwise the Income Tax Officer

could not have charged interest, and that, therefore, no penalty was leviable. On appeal to the Supreme Court, it was held as under (headnote) :

The time allowed for furnishing a voluntary return is the time specified in section 139(1) of the Income Tax Act, 1961. when the Income Tax

Officer extends the date for furnishing the return under proviso (iii) to section 139(1), he does so in the exercise of authority conferred by the statute

and the additional time available to the assessee consequent upon such extension is, for all relevant purposes, of the same character and as

effective as the statutory period specifically enacted by Parliament. It constitutes an integral part of the time allowed for furnishing a return.

Therefore, where the Income Tax officer extends the date, then all the time up to that date is the time allowed for furnishing the return. The

additional period consequent upon such extension falls within the expression "the time allowed" in clause (a) of section 271(1) and the penalty

provisions do not come into play during the period of extension of time by the Income Tax Officer.

6. The Supreme Court, therefore, affirmed the decision of the High Court as well as the Tribunal holding that in the ordinary course of things, the

Income Tax Officer could have extended the date only upon being satisfied that there was good reason for doing so, and that would have been on

the grounds pleaded by the assessee, and that in the circumstances of the case, a presumption could validly be raised that all that was done, and on

the facts of the case, the extension was a matter falling within section 139(1), and the returns furnished by the assessee must be attributed to that

provision and they were not returns furnished within the contemplation of section 139(4) and, therefore, the penalty provisions did not come into

play.

7. In the instant case before us, we are of the opinion that the Tribunal was not justified in law in holding that the Income Tax Officer was justified

in invoking the penalty proceedings. The reasons are obvious. As stated above, the Income Tax Officer has levied the penalty and interest right up

to the date of filing of the return. He could not have extended the time specified by Parliament in section 139 unless the interest is levied on the

assessee, and on being satisfied about the sufficiency of the ground for granting the extension. The fact that the interest has been charged raises a

presumption that the time has been extended by the Income Tax Officer in exercise of his powers under the relevant proviso to sub-section (1) of

section 139.

8. The learned advocate appearing for the Revenue, however, urged that this contention had not been pressed before the Income Tax authorities

or for that matter before the Tribunal and if that has been raised, the Department could have rebutted this presumption. It is no doubt true that this

contention was not urged at the lower level. But we did not think that for that reason it would make any difference so far as this reference is

concerned, because the presumption could have been rebutted by showing that no penal interest has been levied. There was no scope for

establishing this fact since this is almost an admitted position inasmuch as the assessment order clearly records this direction to levy and charge penal

interest. On this admitted position, therefore, there is no scope for the Revenue

to resist this contention or the result that may ensue on raising of this presumption. In view of the legal position enunciated by the Supreme Court in Commissioner of Income Tax, Andhra Pradesh Vs. M. Chandra Sekhar, , there is no escape from the conclusion that the condition precedent for invoking this power of levying penalty u/s 271(1)(a) is not satisfied inasmuch as the assessee has not committed any default by not filing the return in time as allowed by section 139(1). If that is so, the penalty provision contained in section 271(1)(a) does not come into play. The Tribunal has relied on the judgment of this court in CIT v. Damjibhai & Brothers, where the court was, inter alia concerned with the question of the amount of the penalty. The paragraph which has been set out by the Tribunal in support of its view in paragraph 4 of its order clearly indicates that section 271(2) is attracted where a person becomes liable to pay penalty, and the nature of the firm does not make any difference. Here, the very liability of the person to pay penalty has not arisen in view of the decision of the Supreme Court and, therefore, there is no question of application of the principle enunciated in Damjibhai & Bros." case.

9. The result is that this reference is accepted and the question is answered in the negative. that is, in favour of the assessee and against the Revenue. Having regard to the facts of this case, there should be no order as to costs.