
(2004) 01 BOM CK 0004

In the Bombay High Court

Case No : Writ Petition No. 4111 of 1994 22 January 2004

Mrs. Usha A. Kalwani

APPELLANT

Vs

S.N. Soni

RESPONDENT

Date of Decision : 22-01-2004

Acts Referred:

Citation : (2004) 136 TAXMAN 708

Hon'ble Judges : V.C. Daga, J;J.P. Devadhar, J

Bench : Full Bench

Advocate : V.H. Patil and Satish Modi, for the Petitioner R.V. Desai, P.S. Jetly and Mrs. S.V. Bharucha, for the Appellant;

Judgement

V.C. Daga, J.

This petition is directed against the order dated 3-11-1992 (Exhibit E) passed u/s 273A of the Income Tax Act, 1961 (hereinafter referred to as the Act). The facts leading to the present petition in short are :

Facts

2. That on 29-12-1987 when the petitioner was leaving for Singapore from Calcutta Air Port, her person and baggage was searched by the Customs Officials at Calcutta Air Port and certain enquiries were made with respect to the fixed deposit receipts which she was carrying with her, neither any action was taken by the Customs authorities nor any intimation was passed on by them to the Income Tax Department.

3. On the contrary, the petitioner on her own filed her returns on 12-4-1988 declaring her income for the assessment years 1986-87 and 1988-89 in the sum of Rs. 17,380 and Rs. 18,440 respectively. On 27-4-1988 she further filed her return for the assessment years 1982-83, 1983-84, 1984-85, 1985-86 and declared her income in the sum of Rs. 50,000, 55,000, 60,000 and 9,910 respectively.

4. On the basis of the aforesaid returns filed, she was assessed and the assessing officer levied interest and penalty with respect of assessment years 1982-83 and 1984-85 details of which are not necessary for disposal of this petition except to the fact that penalties were levied on the assessee u/s 271(1)(c) of the Act for the assessment years 1982-83, 1983-84 in the sum of the Rs. 12,460 and 19,676 respectively.

5. The said penalties imposed u/s 271(1)(c) were subsequently, quashed and set aside by the Commissioner (Appeals), Pune vide its order dated 29-7-1992.

6. The petitioner on 6-9-1988 moved an application u/s 273A of the Act for waiver of interest and penalty. The said application was heard by the Commissioner, who by his order dated 3-11-1992 rejected the said application holding that the income declared on estimate was without any basis and that no proof or details in support thereof was filed. He also observed that the assessee neither filed the details of the sales and/or purchases of the garments, closing stock, household expenses nor disclosed details of the expenditure on foreign tours and other expenses. It has also been observed that for the assessment year 1984-85, no proper source of deposit lying in her bank account amounting to Rs. 47,000 was disclosed. Considering all these factors, the Commissioner was pleased to hold that the petitioners disclosure could not be said to be full and true for all these years and went on to reject application in question. This order passed u/s 273A is a subject-matter of challenge in the petition filed under article 226 of the Constitution of India.

Submissions

7. Mr. V.H. Patil, learned counsel appearing for the petitioner submits that the requirement of section 273A(1) has been fully complied with. He further submits that no finding was recorded against petitioner to hold that the returns were not voluntary and in good faith. According to him only adverse finding suffered by the assessee/petitioner was that she did not disclose her income with full particulars as such disclosure was not full and true. In his submission these findings cannot be sustained on the text of section 273A(1) itself and is liable to be quashed and set aside. In order to substantiate his submission, he pressed into service the deeming fiction flowing from Explanation to section 273A(1) of the Act and contended that, if the assessing officer, while passing assessment order or any other higher authority in appeal therefrom; holds that the penalty u/s 271(1)(c) is not attracted, then the assessee shall be deemed to have made full and true disclosure of his income or all the particulars relating thereto. He, therefore, submits that the impugned order is unsustainable and is liable to be quashed and set aside.

Per Contra

8. Mr. R.V. Desai, learned counsel appearing for the revenue contends that the returns were filed after the search was taken by the Customs officials at Calcutta Air Port and, therefore, the disclosure made cannot be said to be voluntary and

in good faith. He therefore, submits that a cumulative effect of the findings recorded by the Commissioner should mean that the returns filed by the assesses were not voluntary. He thus tried to support the order and findings recorded therein.

Statutory provisions

9. In order to appreciate the rival submissions it is necessary to have a look to the text of unamended sections 271(1)(c) and 273A(1) and the Explanation appended thereto :

"271. Failure to furnish returns, comply with notices, concealment of income, etc.
(1) If the Income Tax Officer or the Appellate Assistant Commissioner or the Commissioner in the course of any proceedings under this Act, is satisfied that any person

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(c) has concealed the particulars of his income or furnished inaccurate particulars of such income,

he may direct that such person shall pay by way of penalty,

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(ii)

(iii) in the cases referred to in clause (c), in addition to pay tax payable by him, a sum which shall not be less than, but which shall not exceed twice, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income :

Provided that, if in a case falling under clause (c), the amount of income (as determined by the Income Tax Officer on assessment) in respect of which the particulars have been concealed or inaccurate particulars have been furnished exceeds a sum of twenty-five thousand rupees, the Income Tax Officer shall not issue any direction for payment by way of penalty without the previous approval of the Inspecting Assistant Commissioner.

273A. Power to reduce or waive penalty, etc., in certain cases.(1) Notwithstanding anything contained in this Act, the 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 deduction 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;

(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 subsection (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 failing 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 Commissioner except with the previous approval of the Board.

(3) Where an order has been made under sub-section (1) in favour of ally 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 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 :

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

Dissection of above provisions would spell out the condition precedence for exercise of discretion to waive the penalty or interest u/s 273A of the Act, which can be catalogued as under :

(a) voluntary disclosure of income before issuance of notice u/s 139(2);

(b) making of full and true disclosure of the income in goods faith;

(c) co-operation in the conduct of Income Tax assessment proceedings;

(d) payment of satisfactory arrangement for payment of tax or interest payable in consequence of an order passed with respect to the relevant assessment year.

(e) the explanation lays down that a person shall be deemed to have made a 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.

Consideration

10. Having heard the rival parties and having examined the statutory provision, and sweep thereof, let us turn to consider the submissions advanced by the learned counsel for the parties. If one turns to the impugned order passed by the Commissioner (Appeals); wherein categorical findings have been recorded that the assessing officer was not justified in levying penalty u/s 271(1)(c) of the Act in the sum of Rs. 12,460 in the assessment year 1982-83 and Rs. 19,676 for the assessment year 1983-84. If the said findings are tested on the touchstone of

the text of section 271(1)(c) it would be clear that the said section gets attracted only if the assessee has concealed the particulars of income or furnished inaccurate particulars of such income. If the Commissioner (Appeals) recorded a categorical finding that the assessee has not concealed the particulars of her income and did not furnish inaccurate particulars of such income, then the Explanation to section 273A would get squarely attracted with full force and the deeming fiction contemplated therein will come into play. If that be so the deeming fiction will have to be given full effect. Based on this understanding, one has to reach to the logical conclusion that full and true disclosure was made by the assessee. With this understanding of the provisions in question, if one turns to the findings recorded by the Commissioner while rejecting application u/s 273A(1) and examined the same on its own merits, the same cannot stand to the scrutiny of law as understood and is liable to be quashed and set aside.

11. Now, turning to the second shade of the submission advanced by Mr. Desai, without noticing absence of foundation therefore in the impugned order, that the assessee did not furnish returns voluntarily and in good faith, one has to examine the same in the light of proviso to section 273A(1)(ii)(b) which specifically, lays down that, the assessee 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; then only such returns are said to be voluntary and in good faith.

12. So far as the case in hand is concerned, the Commissioner while rejecting application u/s 273A(1) did not record any adverse finding to say that the returns were not voluntary and in good faith. If such findings were not recorded in the adjudication order, then such findings cannot be imported or read or introduced by back door through an affidavit-in-reply to the petition.

13. The Apex Court in the case of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, has held that where a statutory functionary makes an order based on a certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, the order bad in the beginning may, by the time it comes to court on account challenges set validated by additional grounds later brought out. Applying this principle, impugned order cannot be upheld on the ground not to be found in the order. If there is no adverse finding in the impugned order with respect to the absence of voluntariness and good faith, then one has to infer that the filing of returns and disclosures of income therein were voluntary and in good faith. New reason cannot be allowed to be introduced or supplied in the order by back door through an affidavit-in-reply. Hence, the submissions advanced by Mr. Desai in this behalf is devoid of any substance and liable to be rejected.

14. In the above view of the matter, the impugned order is quashed and set aside. The petition is allowed and the matter is remanded back to the

Commissioner to consider the application for waiver of the amount of penalty on the premise that the petitioner has complied with all the conditions of section 273A(1) of the Act.

15. The petition stands disposed of in terms of this order. Accordingly, rule is made absolute, with no order as to costs.