

(1966) 09 AHC CK 0024
In the Allahabad High Court
Case No : Civil Misc. Writ No. 360 of 1966

Om Prakash Agarwal

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 21-09-1966

Acts Referred:

Income Tax Act, 1961 — Section 220(4), 220(6), 221, 221(1)

Citation : AIR 1968 All 82 : (1967) 66 ITR 175

Hon'ble Judges : R.S. Pathak, J

Bench : Single Bench

Advocate : R.K. Upadhya and J.C. Bharadwaj, for the Appellant; R.L. Gulati, for the Respondent

Final Decision : Allowed

Judgement

R.S. Pathak, J.—The petitioner was assessed to Income Tax for the assessment year 1963-64. A notice of demand was served upon him requiring him to pay Income Tax in the sum of Rs. 6,858.88. The petitioner filed an appeal against the assessment order. During the pendency of the appeal, as the petitioner had not paid the tax assessed against him, a notice was issued by the Income Tax Officer on November 18, 1965 calling upon him to show cause why a penalty should not be levied u/s 221(1) of the Income Tax Act, 1961. The notice required the petitioner to appear personally or through an authorised representative on November 24, 1965 or to send a written communication so as to reach the Income Tax Officer on or before that date. On November 23, 1965 the petitioner submitted an application to the Income Tax Officer. The subject of the application was stated as "Request for stay of disputed tax till decision in appeal," and it was mentioned that an appeal was pending before the Appellate Assistant Commissioner of Income Tax wherein the petitioner expected full relief, that the assessment order was erroneous and that the financial position of the petitioner was not then very sound and he was not in a position to liquidate the demand. Upon these allegations, the petitioner prayed that the Income Tax Officer would

treat the petitioner as not being in default during the pendency of the appeal. On December 31, 1965, the Income Tax Officer made an order u/s 221 imposing a penalty of Rs. 500 upon the petitioner for not having paid the entire amount of the assessed tax within the time allowed in that behalf. The petitioner prays for the quashing of the penalty order and for mandamus directing the Income Tax Officer to decide the application dated November 23, 1965 in accordance with law and further to treat the petitioner as not being in default. The petitioner contends that the Income Tax Officer was bound to consider and dispose of the application dated November 23, 1965 and to determine whether the petitioner should be treated as not being in default. It was only if that determination ended in a finding against the petitioner that the Income Tax Officer could consider the question of imposing a penalty u/s 221(1). The contention is well founded.

2. Section 220(1) requires that the amount specified as payable in a notice of demand must be paid within thirty five days of service of the notice at the place and to the person mentioned in the notice. Section 220(3) empowers the Income Tax Officer to extend the time for payment or allow payment by installments. Section 220(4) provides:

"If the amount is not paid within the time limited under Sub-section (1) or extended under Sub-section (3), as the case may be at the place and to the person mentioned in the said notice the assessee shall be deemed to be in default." Then follows Section 220(6):

"Where an assessee has presented an appeal u/s 246, the Income Tax Officer may, in his discretion, and subject to such conditions as he may think fit to impose in the circumstances of the case, treat the assessee as not being in default in respect of the amount in dispute in the appeal, even though the time for payment has expired, as long as such appeal remains undisposed of."

3. The provision for imposing a penalty upon an assessee in default is enacted in Section 221, Sub-section (1) of which reads:

"When an assessee is in default or is deemed to be in default in making a payment of tax, he shall, in addition to the amount of the arrears and the amount of interest payable under Sub-section (2) of Section 220, be liable to pay by way of penalty, an amount which, in the case of a continuing default, may be increased from time to time, so however, that the total amount of penalty does not exceed the amount of tax in arrears:

Provided that before levying any such penalty the assessee shall be given a reasonable opportunity of being heard."

4. Now, it seems to me that before the Income Tax Officer can impose a penalty u/s 221 he must determine whether the assessee is in default or is deemed to be in default in making payment of tax. He is required by the proviso to Section 221(1) to give a reasonable opportunity to the assessee of being heard before levying any such penalty. The assessee may show that he is not in default

because he has paid the amount specified in the notice of demand and in this connection may establish that the records upon which the Income Tax Officer relies for coming to the prima facie conclusion that the assessee is in default are incorrect. The assessee may also show that even though he is in default there are extenuating circumstances explaining why he was unable to pay the amount. The assessee may further be in a position to place material before the Income Tax Officer to show that although a penalty is attracted there is a case for imposing a minimum sum as penalty. The Income Tax Officer will consider all these factors and thereafter determine whether a penalty should be imposed and if so in what sum. While determining the question whether the assessee is in default or is deemed to be in default, the Income Tax Officer must consider not only whether the amount specified in the notice of demand has been paid within the time limited but also whether the assessee has presented an appeal and the circumstances of the case are such that the assessee should be treated as not being in default. This is so particularly, when the assessee has presented an application u/s 220(6) for being treated as not being in default. Whether the assessee should be treated as not going in default is a matter to be considered by the Income Tax Officer before he can decide upon the imposition of a penalty. That consideration directly affects the issue whether the assessee is in default. It is true that he is in default if he has not paid the amount within the time limited. That is so by Section 220(4). But that question has to be determined and it is necessary for the Income Tax Officer to arrive at a finding to that effect. He cannot arrive at that finding before giving the opportunity of being heard to the assessee which is contemplated by the proviso to Section 221(1). And even after coming to the finding that the assessee is to be deemed to be in default by reason of Section 220(4) he must yet arrive at a further finding whether the assessee is to be treated as not being in default notwithstanding the default contemplated by Section 220(4). Both these steps are necessary before the Income Tax Officer can come to the decision that the assessee is in default and a penalty should be imposed upon him. I am fortified in the view that I am taking by the decision of the Mysore High Court in *Esthuri Aswathaiah Vs. Income Tax Officer, Kolar Circle*, .

5. In the instant case, the Income Tax Officer did not dispose of the application of November 23, 1965 before making the order of penalty on December 31, 1965. He was bound to do so and his omission vitiates the penalty order.

6. The petition is allowed. A writ in the nature of certiorari shall issue quashing the order dated December 31, 1965. The Income Tax Officer is directed to consider the application dated November 23, 1965 and then to dispose of the penalty proceedings. The petitioner is entitled to his costs.