

(2007) 09 JH CK 0018
In the Jharkhand High Court

OMEC Engineers

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 18-09-2007

Acts Referred:

Banking Regulation Act, 1949 — Section 51

COMPANIES ACT, 1956 — Section 617

Income Tax Act, 1961 — Section 143, 256, 269SS, 271, 271A

Citation : (2008) 217 CTR 144 : (2008) 1 JCR 221

Hon'ble Judges : M.Y. Eqbal, J;D.G.R. Patnaik, J

Bench : Division Bench

Judgement

M.Y. Eqbal, J.—In the instant case, the Tribunal referred the following question of law u/s 256(1) of the Income Tax Act, 1961 for opinion by this Court:

Whether in the facts and circumstances of the case, there was reasonable cause for the assessee to receive the loans and deposits in cash and not by the account payee cheque or account payee bank draft as required u/s 269SS and, as such the penalty levied u/s 271D for receiving the loans and deposits in cash, was proper and justified?

2. The facts of the case lie in a narrow compass:

The assessee is a firm carrying on contract business. The assessee received Rs. 20000/- or more in cash from 11 persons in between 14.2.1993 and 10.11.1993 amounting to Rs. 5 lacs. The return filed by the assessee was, however, accepted u/s 143(3) of the Income Tax Act. After the assessment was made, a penalty proceeding u/s 271D of the said Act was initiated by the Assessing Authority for receiving and accepting those deposits in violation of provisions u/s 269SS of the Act. In compliance to the notice issued by the Assessing Authority, the assessee submitted his explanation stating, inter alia, that the assessee firm was in urgent need of money for payment to the labourers and sufficient cash was not available, therefore, he received deposits from different persons in cash. The assessee further stated that his return was finally accepted u/s 143(3) of the Act

and no loss of revenue was found. The assessee further stated that he has not acted deliberately in defiance of law. The Deputy Commissioner of Income Tax, Ranchi finally passed the order in the penalty proceeding imposing penalty of Rs. 7 lacs which is equal to the deposits accepted by the assessee. The authority took the view that the provision u/s 269SS is a rule of procedure to avoid evasion of tax and to safeguard interest of Revenue and admittedly the assessee has violated the provisions u/s 269SS which made him liable for penalty u/s 271D.

3. Aggrieved by the said order, the assessee preferred appeal before the Commissioner of Income Tax (Appeals), Ranchi. The appellate authority held that the provisions under Section 271D is not attracted unless the appellant proves that there was a reasonable cause for failure of compliance as contemplated u/s 273B of the Act. The appellate authority, therefore, affirmed the order of penalty. The assessee then preferred Second Appeal before the Income Tax Appellate Tribunal. The Tribunal held that there was no reasonable cause for taking the deposits in cash in violation of provisions u/s 269SS. The Tribunal disapproved the assessee's claim that it had taken loans in cash because cash was not available in order to make cash payment to the labourers, petty contractors, etc.

On an application filed by the assessee, the Tribunal formulated the question of law quoted herein above and referred the same to this Court for opinion.

4. Mr. D.V. Pathy, learned Counsel appearing for the assessee firstly drew our attention to the provisions of the Act and submitted that the purpose and objection of Section 269SS is only to prevent the laundering of black money. In the instant case, there is a concurrent finding that the transaction was genuine and therefore, the return filed by the assessee was accepted after the scrutiny u/s 143(3) of the Act. Learned Counsel further submitted that in absence of any finding by any of the authority that the transaction was mala fide and with the sole objection to disclose the concealed or undisclosed money, no penalty can be imposed. Learned Counsel relied upon the case of Kerala State Industrial Development Corpn. Ltd. Vs. Commissioner of Income Tax, , Hindustan Steel Ltd. Vs. State of Orissa, .

5. Mr. Jhunjhunwala, learned Counsel appearing for the Revenue, on the other hand, submitted that the assessee could not show reasonable cause at any stage for receiving the cash amount in contravention of the provisions u/s 269SS of the Act. Learned Counsel submitted that since the assessee failed to satisfy the authority by showing reasonable cause, he shall be liable to pay penalty u/s 271D of the said Act.

6. Before appreciating the rival contentions made by the parties, I would first like to discuss the relevant provisions of the Income Tax Act.

7. Section 269SS was inserted by the Finance Act, 1984 with effect from 1.4.1984 which lays down the mode of taking and accepting certain loans and deposits. Section 269SS reads as under:

269SS. Mode of taking or accepting certain loans and deposits.

No person shall, after the 30 days of June, 1984, take or accept from any other person (hereafter in this section referred to as the depositor), any loan or deposit otherwise than by an account payee cheques or account payee bank draft if -

(a) the amount of such loan or deposit or the aggregate amount of such loan and deposit; or

(b) on the date of taking or accepting such loan or deposit, any loan or deposit taken or accepted earlier by such person from the depositor is remaining unpaid (whether repayment has fallen due or not), the amount or the aggregate amount remaining unpaid; or

(c) the amount or the aggregate amount referred to in Clause (a) together with the amount or the aggregate amount referred to in Clause (b),

is twenty thousand rupees or more:

provided that the provisions of this section shall not apply to any loan or deposit taken or accepted from, or any loan or deposit taken or accepted by, -

(a) Government;

(b) Any banking company, post office savings bank or cooperative bank;

(c) Any corporation established by a Central, State or Provincial Act;

(d) Any Government company as defined in Section 617 of the Companies Act, 1956 (I of 1956);

(e) Such other institution, association or body or class of institutions, associations or bodies which the Central Government may, for reasons to be recorded in writing notify in this behalf in the Official Gazette;

[Provided further that the provisions of this section shall not apply to any loan or deposit where the person from whom the loan or deposit is taken or accepted and the person by the whom the loan or deposit is taken or accepted are both having agricultural income and neither of them has any income chargeable to tax under this Act.]

Explanation. - For the purposes of this section, -

(i) "banking company" means a company to which the Banking Regulation Act, 1949 (10 of 1949), applies and includes any bank or banking institution referred to in Section 51 of that Act;

(ii) "co-operative bank" shall have the meaning assigned to it in Part V of the banking Regulation Act, 1949 (10 of 1949);

(iii) "loan or deposit" meant; loan or deposit of money.

8. From bare reading of the aforesaid provision, it is manifestly clear that after

the insertion of the aforesaid section, no person should take or accept from any other person any loan or deposits otherwise than by an account payee cheques or account payee bank draft if the amount is Rs. 20000/- or more.

9. Section 271D lays down the provisions of imposition of penalty for failure to comply with the provisions of Section 269SS. Section 271D reads as under:

271D. Penalty for failure to comply with the provisions of Section 269SS

(1) If a person takes or accepts any loan or deposit in contravention of the provisions of Section 269SS, he shall be liable to pay, by way of penalty, a sum equal to the amount of the loan or deposit so taken or accepted.

(2) Any penalty imposed under Sub-section (1) shall be imposed by the Joint Commissioner.

10. Section 273B, which was inserted by Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986, however, provides that no penalty shall be imposed if the assessee proves that there was reasonable cause for the said failure. Section 273B reads as under:

273B. Penalty not to be imposed in certain cases.

Notwithstanding anything contained in the provisions of Clause (b) of Sub-section (1) of Section 271, Section 271A, [Section 271AA], Section 271B, [Section 271BA), [Section 271BB,) Section 271C, [Section 271CA] Section 271D, Section 271E, [Section 271F] [Section 271FA,) [Section 271FB] [Section 271G] Clause (c) or Clause (d) of Sub-section (1) or Sub-section (2) of Section 272A, Sub-section (1) of Section 272AA] or [Section 272B, or] [Sub-section (1) [or Sub-section (1A)} of Section 272BB or] [Sub-section (1) of Section 272BBB or] Clause (b) of Sub-section (1) or Clause (b) or Clause (c) of Sub-section (2) of Section 275 no penalty shall be imposed on the person or the assessee, as the case may be, for any failure referred to in the said provisions if he proves that there was reasonable cause for the said failure].

11. Before expressing our opinion on the question of law referred by the Tribunal, it would be useful to consider the purpose and object of insertion of the provisions of Section 269SS, 271D and 273B of the Income Tax Act, 1961.

12. The Memorandum explaining the provisions in the Finance Bill, 1984 was placed before the Parliament by the Finance Minister. In the said memorandum, the purpose of enacting the provisions of Section 269SS was explained saying that unaccounted cash found in course of search carried out by the Income Tax Department is taxable by the tax payee as representing loans taken from or deposits made by various persons. Unaccounted income is also brought into the books of account in the form of such loans and deposits and taxpayers are also able to get confirmatory letters from such persons in support of their explanation. With a view to circumventing this device, which enables taxpayers to explain away unaccounted cash or unaccounted deposits, the provisions was

inserted. The relevant text of the memorandum is reproduced herein below:

Prohibition against taking or accepting certain loans and deposits in cash

22. Unaccounted cash found in the course of searches carried out by the Income Tax Department is often explained by taxpayers as representing loans taken from or deposits made by various persons. Unaccounted income is also brought into the books of account in the form of such loans and deposits, and taxpayers are also able to get confirmatory letters from such persons in support of their explanation.

23. With a view to circumventing this device, which enables taxpayers to explain away unaccounted cash or unaccounted deposits, the Bill seeks to make a new provision In the Income Tax Act debarring persons from taking or accepting after 30th June, 1984, from any other person any loan or deposit otherwise than by an account payee cheques or account payee bank draft if the amount of such loan or deposit or the aggregate amount of such loan and deposit is Rs. 10,000 or more. This prohibition will also apply in cases where on the date of taking or accepting such loan or deposit, any loan or deposit taken or accepted earlier by such person from the depositor is remaining unpaid (whether repayment has fallen due or not), and the amount or the aggregate amount remaining unpaid is Rs. 10,000 or more. The proposed prohibition would also apply in cases where the amount of such loan or deposit, together with the aggregate amount remaining unpaid on the date on which such loan or deposit is proposed to be taken, is Rs. 10,000 or more.

24. The proposed prohibition will, however, not apply to any loan or deposit taken or accepted from, or any loan or deposit taken or accepted by, the following, namely:

- (a) Government;
- (b) Any banking company, post office savings bank or cooperative bank;
- (c) Any corporation established by a Central, State or Provincial Act;
- (d) Any Government company as defined in Section 617 of the Companies Act, 1956;
- (e) Such other institution, association or body or class of institutions, associations or bodies which the Central Government may, for reasons to be recorded in writing notify in this behalf in the Official Gazette;

25. For the purposes of proposed provision, the expression "banking company: shall have the meaning assigned to it in Clause (a) of the Explanation to Section 40A(i) of the Income Tax Act and the expression "co-operative bank" shall have the meaning assigned to it in Part V of the Banking Regulation Act, 1949. The expression "loan or deposit", for the. purposes of the proposed provision, would mean loan or deposit of money.

26. If a person without reasonable cause or excuse takes or accepts any loan or deposit in contravention of the aforesaid provisions, he shall be punishable with imprisonment for a term which may extend to two years and shall also be liable to a fine equal to the amount of such loan or deposit.

27. The proposed provisions will take effect from 1st April, 1984, but as stated above, the prohibition contained therein shall apply in relation to any loan or deposit taken or accepted after 30th June, 1984.

13. In the case of *K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another*, the Supreme Court while considering the admissibility of the speeches made by the members of the Legislature on the floor of the House observed:

Now it is true that the speeches made by the Members of the Legislature on the floor of the House when a Bill for enacting a statutory provision is being debated are inadmissible for the purpose of interpreting the statutory provision but the speech made by the Mover of the Bill explaining the reason for the introduction of the Bill can certainly be referred to for the purpose of ascertaining the mischief ought to be remedied by the legislation and the object and purpose for which the legislation is enacted, "this is in accord with the recent trend in juristic thought not only in western countries but also in India that interpretation of a statute being an exercise in the ascertainment of meaning, everything which is logically relevant should be admissible.

14. In the case of *Kerala State Industrial Development Corpn. Ltd. Vs. Commissioner of Income Tax*, the Supreme Court while answering the reference on a particular question of law under the Income Tax Act referred the decision of *K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another*, and held that the Finance Minister's speech can be relied upon to throw light on the object and purpose of the particular provisions introduced by the Finance Bill.

15. The moot question, therefore, that falls for consideration is that as to whether the assessee shall be subjected to imposition of penalty, notwithstanding the finding recorded by the authority that the transaction made in violation of Section 269SS of the Act was a genuine transaction and the return was finally accepted u/s 143(3) of the Act and further that no loss of revenue was found.

16. The nature of penalty and principle governing imposition of the same are well settled by a catena of decisions of the Supreme Court and various High Courts. The settled proposition of law, therefore, is that provisions dealing with penalty must be strictly construed. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi criminal proceeding and penalty will not ordinarily be imposed unless the party either acted deliberately in defiance of law or was guilty of conduct, contumacious or dishonest or acted in conscious disregard of his obligation. Penalty will also not be imposed merely because it is lawful to do so. Rather penalty should be imposed for failure to perform a statutory obligation which is a matter of discretion of the authority to be:

exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. Reference may be made to the decision in Hindustan Steel Ltd. (supra).

17. One of the cardinal principles of English Criminal Law is expressed in the maxim "actus non facit mini, nisi metis sit rea", that is, "a person cannot be convicted and punished in a proceeding of a criminal nature unless it can be shown that he had a guilty mind". A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in his nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws.

18. In the case of Hindustan Steel Ltd. Vs. State of Orissa, , the facts of the case were that the appellant-company supplied to the contractors for use in construction coal of factory building for the steel plant, residential building for its employees, bricks, coal, cement, steel, etc for consideration and adjusted the value of the goods supplied at the rates specified in the tender. The Sales Tax Officer held that the company was liable to pay tax on the ground that it was a dealer in the building material and had sold materials to contractors and imposed penalty for failure to register as a dealer. The appellate authority and the Tribunal confirmed the order. The High Court also answered the reference against the appellant. The main questions that arose before the Supreme were whether the company sold building materials to the contractors during the relevant period, whether the company was a dealer in respect of building material within the meaning of Orissa Sales Tax Act, whether the imposition of penalties for failure to register as a dealer was justified. On the question of imposition of penalty, the Supreme Court observed that the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. Penalty will not ordinarily be imposed unless the person acted as a dealer in defiance of law and was guilty of conduct, contumacious or dishonest. Their Lordships observed:

8. Under the Act penalty may be imposed for failure to register as a dealer - Section 9(1) read with Section 25(1)(a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in

refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of (he affairs of the Company in failing to register the Company as a dealer acted in the honest and genuine belief that the Company was not a dealer. Granting that they erred, no case for imposing penalty was made out.

19. In the case of Commissioner of Income Tax Vs. Bengal Iron Galvanising Works, a Bench of Calcutta High Court while considering the provisions of Section 271(1)(c) following the decision of the Supreme Court in case of Hindustan Steel Ltd.'s case (supra), observed that it is not mandatory u/s 271 that a penalty must be imposed in every case.

20. The words "reasonable cause" have not been defined under the Act but they could receive the same interpretation which is given to the expression sufficient cause". Therefore, in the context of the penalty provisions, the words "reasonable cause" would mean a cause which is beyond the control of the assessee. "Reasonable cause" obviously means a cause which prevents a reasonable man of ordinary prudence acting under normal circumstances, without negligence or inaction or want of bona fides. Before imposition of penalty u/s 271, the Assessing Officer must be satisfied, not arbitrarily but judiciously, that assessee has without reasonable cause failed to comply the provisions.

21. In the instant case, as noticed above, there is no finding of assessing authority, the appellate authority or the Tribunal that the transaction made by the assessee in breach of provisions of Section 269SS was not a genuine transaction. On the contrary, the return filed by the assessee was accepted after the scrutiny u/s 143(3) of the Act. Further, there is no finding of the appellate authority that the transaction in breach of aforesaid provisions made by the assessee was mala fide and with the sole object to disclose the concealed or undisclosed money. The authorities have proceeded on the basis that breach of condition provided u/s 269SS of the Act shall lead to penal consequences. In our view, in the facts and circumstances of the case, the imposition of penalty merely on technical mistake committed by the assessee, which has not resulted in any loss of revenue, shall be harsh and cannot be sustained in law.

22. After considering the entire facts and circumstances of the case, the reference is answered in favour of the assessee and against the Revenue. Consequently, we hold that imposition of penalty u/s 271D against the assessee cannot be sustained in law.

D.G.R. Patnaik, J.

23. I agree.