
(1980) 01 AHC CK 0035

In the Allahabad High Court

Case No : Income-tax Reference No. 38 of 1975

Rajeev Kumar Gupta

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 29-01-1980

Acts Referred:

Income Tax Act, 1961 — Section 154, 271(1), 274

Citation : (1980) 123 ITR 907 : (1980) 4 TAXMAN 345

Hon'ble Judges : R.R. Rastogi, J;C.S.P. Singh, J

Bench : Division Bench

Advocate : R.K. Gulati, for the Appellant; A. Gupta, for the Respondent

Judgement

C.S.P. Singh, J.—The Income Tax Appellate Tribunal has referred the, following question for our opinion :

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that no fresh opportunity was required to be given to the assessee before the imposition of penalty even though after the assessee had submitted his reply to the show-cause memo, the assessment had been revised u/s 154 and the penalty should be upheld, if at all, on the basis of the revised order ?"

2. The facts necessary for answering this question are these :

The assessee was assessed for the assessment year 1965-66 on 24th September, 1968, on an income of Rs. 31,845, the returned income being Rs. 26,130. As a result of this order, an amount of Rs. 1,024 became due to the assessee and the assessee was informed of this by notice u/s 156. It appears that there had been delay on the part of the assessee in filing his return and a notice u/s 271(1)(a) was also issued directing the assessee to file a reply by the 19th October, 1968. The assessee took time to file his reply which was submitted by him on 19th June, 1970. In the reply the assessee stated that as an amount of Rs. 1,024 was refundable to him, there was no question of imposition of any

penalty as no tax was payable. After the ITO received this reply, no proceedings took place for a considerable length of time. On the 12th February, 1970, the ITO issued a notice u/s 154 proposing to rectify the assessment order on the ground that while making the original assessment he had erroneously taken the net amount of dividend income while he should have included the gross amount of dividend in the taxable income. He also proposed to rectify the adjustment of tax at source from an amount of Rs. 5,125 to Rs. 7,410. Another rectification notice was issued on 22nd August, 1970, intimating the assessee that the ITO proposed to bring to tax the assessed share income of the firm in which the assessee had been admitted to the benefits of partnership. On the 14th September, 1970, the assessee informed the ITO that he had no objection to the proposed rectification. By order dated 15th September, 1970, the ITO rectified the assessment and determined the taxable income at Rs. 1,19,230 against the original assessed income of Rs. 31,845. This order was served on the assessee on the 17th September, 1970. Before this order was communicated to the assessee, the ITO on the 15th September, 1970, passed an order u/s 271(1)(a) on the basis of the rectified assessment order which had been served on the 17th September, 1970. The assessee appealed, and the AAC annulled the order of penalty on the ground that before the order could be passed a fresh opportunity should have been given to the assessee, inasmuch as a penalty had been imposed on the basis of the rectified assessment order and not on the basis of the original assessment order. The Tribunal did not agree with this. It held that, as the assessee had agreed to the rectification of the assessment order a few days before the penalty was imposed, it was not necessary for the ITO to have issued a fresh notice after the assessment was rectified. However, in view of the fact that the delay in filing the return for the period during which the firm had not filed its return, provided a reasonable cause for not filing the return, the Tribunal directed the ITO to impose penalty for a shorter period. The question referred to us requires an answer as to whether it was necessary to give a fresh opportunity to the assessee after the assessment order was rectified and further whether the imposition of penalty by the ITO on the basis of the revised order can be upheld.

3. Sri A. Gupta, appearing on behalf of the department, contended that we should also go into the question as to whether the defect, if any, in the order of the ITO stood cured by the fact that the assessee had been given an opportunity to show cause against the penalty at the appellate stage, both by the AAC (Judicial) and the Tribunal. Sri R.K. Gulati, appearing for the assessee, contended that no such opportunity whatsoever was given to the assessee at the appellate stage, for, the only question canvassed before the appellate authority was as to whether a fresh opportunity was necessary after the assessment order was passed. It was also urged that on the frame of the question as referred we should not go into this controversy, for neither does the question referred solicit an answer on this aspect nor was it ever the department's case that the defect in the penalty order stood cured by successive appeals preferred by the assessee. We are inclined to agree with this submission, for, as already indicated

earlier, the question referred does not embrace this controversy, nor the department made an attempt to justify the order on the basis suggested by counsel for the department. Thus, the only controversy is that which we have indicated earlier.

4. A penalty u/s 271(1)(a) can be imposed for delay in the filing of returns unless the assessee shows reasonable cause for the delay. The quantum of penalty as set out in Section 271(1)(a), as it stood in the relevant year, was 2% of the tax for every month during which the default continued, but not exceeding 15% of the tax. Thus, if no tax was payable by the assessee no penalty was eligible for late filing of the return. This being so, as the notice u/s 271(1)(a) had been issued on the basis of the original assessment order, the assessee rightly contended in his reply that the penalty proceedings should be dropped as he had become entitled to a refund by virtue of the original assessment order. The situation, however, changed with the rectification of the assessment order, for, as a result thereof, the assessee became liable to pay an additional amount of tax. No notice was given to the assessee to show cause why a penalty should not be imposed u/s 271(1)(a) on the basis of the rectified assessment order. Now, Section 274 requires that no order imposing a penalty shall be made unless the assessee has been heard, or has been given a reasonable opportunity of being heard. Reasonable opportunity postulates that the facts, on the basis of which the penalty is proposed to be imposed, should be intimated so that the assessee may have a chance of showing cause against the proposed penalty. A notice which does not intimate the assessee of the particular facts on the basis of which the order is proposed to be passed would not comply with the requirements of Section 274. The Tribunal has upheld the department's plea that the penalty order was not vitiated on account of the fact that the assessee knew that the penalty was being imposed on the basis of the rectified assessment. We are, however, of the view that, as Section 274 requires a reasonable opportunity to be given to the assessee of being heard which can be done only in case a proper notice is issued, mere knowledge on the part of the assessee of the basis on which the penalty was proposed to be imposed would not meet the requirements of Section 274. We also think that there is no basis for the Tribunal's view that the assessee knew that the penalty was going to be imposed on the basis of the rectified assessment when the notice u/s 271(1)(a) had been issued much earlier on the basis of the original assessment order. It is also worth taking note of the fact that the reply submitted by the assessee to the notice u/s 271(1)(a) was an effective reply, and as the matter stood before the rectification order, no penalty was eligible on the assessee. This being so, as the penalty order was passed on the basis of the rectified assessment order, i.e., in changed circumstances, a fresh notice had to be issued before the penalty could be founded on the rectified order.

5. We accordingly answer the question in the negative, in favour of the assessee and against the department. The assessee is entitled to costs which are assessed at Rs. 200. Counsel fee assessed at the same figure.