
(1973) 01 CAL CK 0015
In the Calcutta High Court
Case No : Matter No. 325 of 1967

Stadmed (P.) Ltd.

APPELLANT

Vs

Income Tax Officer, "H" Ward and Others

RESPONDENT

Date of Decision : 12-01-1973

Acts Referred:

Income Tax Act, 1961 — Section 274, 274(2)

Citation : (1974) 97 ITR 104

Hon'ble Judges : T.K. Basu, J

Bench : Single Bench

Advocate : S. Bhattacharjee, for the Appellant; S. Sen, for the Respondent

Judgement

T.K. Basu, J.—In this application under Article 226 of the Constitution of India the petitioner, Stadmed (P.) Ltd., challenges a notice dated the 27th March, 1967, issued by the Income Tax Officer, "H" Ward, Companies Dist. V, Calcutta, u/s 274 read with Section 271 of the Income Tax Act, 1961, hereinafter referred to as "the Act".

2. The facts of this case lie within a very short compass and are not disputed. The assessment year with which we are concerned is 1962-63. The impugned notice was issued on the 27th March, 1967, whereas the order of assessment for that year was made on the 29th March, 1967, that is, two days subsequent to the date of the issue of the notice of penalty. Mr. S. Bhattacharjee, learned counsel appearing on behalf of the assessee, draws my attention to Section 274(2) of the Act, which is in the following terms :.

"274. (2) Notwithstanding anything contained in Clause (iii) of Sub-section (1) of Section 271, if in a case falling under Clause (c) of that Sub-section, the minimum penalty imposable exceeds a sum of Rs. 1,000, the Income Tax Officer shall refer the case to the Inspecting Assistant Commissioner who shall, for the purpose, have all the powers conferred under this Chapter for the imposition of penalty."

3. My attention was next drawn to a Division Bench judgment of this court in the case of Commissioner of Income Tax Vs. A.K. Das, In that decision, after stating the relevant statutory provisions, P. B. Mukharji J. (as he then was), observed at page 47 of the report as follows:

"Certain results follow from a provision of this nature. The first is that the authority, prima facie, belongs to the Income Tax Officer. It is before him that the first foundations of penalty are laid. That foundation is his "satisfaction" in the course of assessment proceedings that there has been concealment. He is, therefore, the fons et origo of this penalty proceeding. Unless he initiates or the Appellate Assistant Commissioner initiates, the Inspecting Assistant Commissioner cannot initiate. In the natural context that is what should be when one remembers that after all the assessment proceedings are being held by the Income Tax Officer or the Appellate Assistant Commissioner who are the persons likely at all to know whether there has been a concealment and not the Inspecting Assistant Commissioner who not dealing with the regular assessment proceedings, would have little or no knowledge of concealment. It is significant to emphasize also that Section 271 of the Income Tax Act does not breathe a word about Inspecting Assistant Commissioner."

4. The only other observation in the judgment which may be noticed is at page 48 of the report and is as follows:

"The conclusion follows that all cases of penalty and penalty proceedings have their source originally with the Income Tax Officer."

5. Relying on these two observations of the Division Bench, it was submitted by Mr. S. Bhattacharjee that the Income Tax Officer, being the authority who is the source or fountain-head of the initiation of penalty proceedings, in a case where the Income Tax Officer makes a reference of the penalty proceedings to the Inspecting Assistant Commissioner by virtue of the provisions contained in Section 274(2) of the Act, he must be satisfied that the penalty imposable in a particular case exceeds the sum of Rs. 1,000. That satisfaction, it was contended, cannot be arrived at by the Income Tax Officer until he had passed the order of assessment in which the final calculations with regard to concealed income are made in so far as the Income Tax Officer is concerned. Mr. Bhattacharjee did not dispute the proposition that the satisfaction of the Income Tax Officer must be of a prima facie or tentative nature. Even then he submitted that until the order of assessment has been finalised by the officer concerned, he cannot possibly arrive at that satisfaction. As in the instant case the order of assessment was passed on the 29th March, 1967, it could not be postulated that the Income Tax Officer was satisfied that the penalty imposable in the present case exceeds the sum of Rs. 1,000. Since he issued the notice on the 27th March, 1967, before the order of assessment was passed, it must necessarily follow that, on the date the impugned notice referring the case to the Inspecting Assistant Commissioner was issued u/s 274(2) of the Act, the Income Tax Officer could not possibly be satisfied that the penalty imposable exceeded Rs. 1,000.

Consequently the condition precedent for the exercise of power u/s 274(2) of the Act being absent, the impugned notice referring the case to the Inspecting Assistant Commissioner must be held to be entirely without jurisdiction and void. Mr. Bhattacharjee also submitted that any material contained in the order of assessment which was passed on a date subsequent to the issue of the notice could not be called in aid of the satisfaction of the Income Tax Officer at the time of the issue of the impugned notice.

6. Lastly, it was submitted by Mr. Bhattacharjee that Section 271 read with Section 274 of the Act requires that before a notice u/s 274(2) is issued the Income Tax Officer must be "satisfied". He drew my attention to the impugned notice which contains, inter alia, the following expression :

"Whereas it appears to me that you have concealed the particulars of your income "

7. The expression "it appears to me", according to Mr. Bhattacharjee, was not the same as the expression "I am satisfied". Therefore, it was submitted that the notice has not been issued in compliance with the provisions of Section 271 read with Section 274 of the Act.

8. I must note at the outset when the matter originally came up for hearing before me that the affidavit in answer to the rule filed by the Income Tax Officer, N. N. Chatterjee, and affirmed on the 10th August, 1967, hardly contained any material which could provide an answer to the challenge which was thrown by the petitioner in the present case. The only averments in that affidavit material for the present purpose are to be found in paragraph 3 and are as follows :

"I have to state that in the course of the assessment proceedings for the assessment year 1962-63 of the petitioner, it was detected that the petitioner had deliberately and systematically concealed its real profit by various manipulations. In the premises for the reasons mentioned in the assessment order a sum of Rs. 7,41,000 was added, because of this addition, on account of concealment of Income Tax, notice u/s 274 read with Section 271 of the Income Tax Act, 1961, was issued and as the matter concerned penalty of more than Rs. 1,000, the matter was referred to the Inspecting Assistant Commissioner, Range XII."

9. Having regard to this rather unsatisfactory nature of the original affidavit filed on behalf of the revenue, a prayer was made before me for leave to file a further affidavit containing the relevant materials. That leave was granted by me and, pursuant to such leave, an affidavit has been filed by the Income Tax Officer, Mr. Chatterjee, which has been affirmed on the 16th December, 1972. On a perusal of this affidavit it appears that the assessee had filed a return for the assessment year 1962-63 showing an income of Rs. 1,39,984. Notices under sections 143(2) and 142(1) were duly issued to the assessee under the provisions of the Income Tax Act. The assessee appeared from time to time through its authorised representatives. It appeared from the examination of the books of account that

the assessee had concealed its real profit by manipulation in raw materials, stores, ledger, inflation of purchase, inflation of expenses, under-valuation of closing stock of finished goods and suppression of sales. Detailed examination of the books of account were made on a large number of dates by the deponent, namely, 4th, 9th, 10th, 17th and 22nd November, 1966; 10th and 16th January, 1967 ; 7th, 17th and 22nd February, 1967; 1st, 3rd, 8th, 10th, 15th, 16th, 20th and 23rd March, 1967. It is stated in the affidavit that some of the books produced by the assessee were found to be very unsatisfactory and in fact some of the books were impounded u/s 131(3) of the Act. There were also certain interpolations noticed in the books of account which were recorded in the order-sheet of the assessment file of the petitioner. Various discrepancies were found in these books and the representatives of the assessee were called upon to explain such discrepancies. They were, however, unable to explain the discrepancies. The assessee was required to produce its general ledger, journal and cash book which the assessee failed and neglected to do on the pretext that the said books were under the custody of the assessee's solicitor under the order of the Company Tribunal dated the 3rd August, 1966. Thereupon, notices were issued to the petitioner's solicitor to produce the same books.

10. Paragraph 2(c) of the affidavit of Mr. Chatterjee affirmed on the 16th December, 1972, is worth quoting in full:

"Furthermore, in the course of the examination of the books and documents, it became very clear and I was satisfied that the assessee had deliberately concealed material particulars of its income and had also deliberately supplied false particulars thereof and it also clearly appeared that it was a fit case for imposition of penalty, u/s 271. It was also clear that the concealment of income by the assessee had been on a very large scale and the penalty imposable in this case would be much more than Rs. 1,000. In the circumstances, the case of the assessee of imposition of penalty was referred by me to the Inspecting Assistant Commissioner, Range XII, Calcutta, on 27th March, 1967. Aforesaid reference was made after the hearing of the assessee's case which was concluded on 23rd March, 1967. The assessment order was finally passed by me on 29th March, 1967."

11. Although according to the paragraph quoted above, the hearing of the assessee's case was concluded on the 23rd March, 1967, it is found on a reference to the order-sheet that it was actually concluded on the 25th March, 1967, when the last discussion took place between the Income Tax Officer and the authorised representatives of the assessee-company. Mr. S. Sen, appearing on behalf of the revenue, relied on a decision of the Supreme Court in the case of Commissioner of Income Tax, Madras, and Another Vs. S.V. Angidi Chettiar, . The relevant observations of the court are to be found at page 745 of the report and are in the following terms:

"The power to impose penalty u/s 28 depends upon the satisfaction of the Income Tax Officer in the course of proceedings under the Act; it cannot be

exercised if he is not satisfied about the existence of conditions specified in Clause (a), (b) or (c) before the proceedings are concluded. The proceeding to levy penalty has, however, not to be commenced by the Income Tax Officer before the completion of the assessment proceedings by the Income Tax Officer. Satisfaction before conclusion of the proceeding under the Act, and not the issue of a notice or initiation of any step for imposing penalty is a condition for the exercise of the jurisdiction. There is no evidence on the record that the Income Tax Officer was not satisfied in the course of the assessment proceeding that the firm had concealed its income."

12. Relying on the above observations, Mr. Sen contended that the only question to be decided in the present application is that having regard to the entire facts of the case can it be said that before the Income Tax Officer issued the impugned notice dated 27th March, 1967, there were materials before him on the basis of which he could have arrived at a prima facie satisfaction that the penalty imposable in the instant case would exceed Rs. 1,000. In this connection the concluding portion of the order of assessment may be noted :

"Penalty proceedings u/s 271(1)(c) have already been initiated for several concealments discussed in the order."

13. It must be noted that the hearing of the assessment case of the petitioner for this year went on for several months. Large number of days were spent in scrutinizing the books of account of the petitioner. As already noted, some of the books of account had been impounded. The Income Tax Officer had formed the view that not only was the assessee concealing a large number of the relevant books of account, but there were various interpolations and discrepancies in the books which were produced and which could not be explained to the satisfaction of the income tax Officer. The last hearing of the assessment case took place on the 25th March, 1967.

14. Taking all these things into consideration, it will, in my view, be perfectly legitimate to presume that by the time the hearing of the case was concluded, and before the actual order of assessment was written out, the Income Tax Officer must have formed a fairly clear idea of the magnitude of the income that was being sought to be evaded by the assessee and which would in the ultimate assessment order be included as the undisclosed or concealed income of the assessee. As it transpires, the amount of that concealed income comes to Rs. 7,41,000 as mentioned in the order of assessment.

15. No authority has been cited before me either for the proposition that in finding out whether the Income Tax Officer had formed a prima facie satisfaction before the issue of the notice of penalty u/s 274(2), the order of assessment which might have been passed later cannot be looked into nor for the proposition that such satisfaction must be reduced in the form of a writing or an endorsement in the order-sheet of the assessment file of the assessee in question. That being so, one has to take the entire conspectus of the facts of

each particular case and find out on the basis of probabilities as to whether the Income Tax Officer, before the issue of the notice of penalty, had formed the belief that the penalty imposable would exceed the sum of Rs. 1,000. In the facts of the instant case there is no doubt whatsoever in my mind that after the hearing was concluded on the 25th March, 1967, the Income Tax Officer must have formed a tentative belief that the assessee may be liable to a penalty of several lakhs of rupees. That being the position, in my view, the Income Tax Officer was perfectly justified in issuing the impugned notice and it cannot be said that the conditions precedent for the exercise of jurisdiction u/s 274(2) of the Act have not been fulfilled in the present case.

16. Both parties relied on the observations of the Supreme Court in the case of D.M. Manasvi Vs. Commissioner of Income Tax, Gujarat, II Ahmedabad, . The observations at page 563 of the report are as follows:

"It may also be observed that what is contemplated by sections 271 and 274 of the Act is that there should be, prima facie, satisfaction of the Income Tax Officer or the Appellate Assistant Commissioner in respect of the matters mentioned in Sub-section (1) before he hears the assessee or gives him an opportunity of being heard. The final conclusion on the point as to whether the requirements of Clauses (a), (b) and (c) of Section 271(1) have been satisfied would be reached only after the assessee has been heard or has been given a reasonable opportunity of being heard."

17. This legal position was not disputed by the learned counsel for the assessee as I have already indicated.

18. Mr. Bhattacharjee also relied on a decision of the Supreme Court in the case of The Commissioner of Income Tax Madras Vs. Khoday Eswarsa and Sons, being an authority for the proposition that the penalty cannot be levied solely on the basis of the reasons given in the original order of assessment. That may be so. But I do not see how this proposition helps the petitioner in the present case. We are not concerned at this stage with the levy of penalty but only with the initiation of the proceedings u/s 271 read with Section 274 of the Act.

This disposes of all the contentions raised by the parties. 19. In the result this application fails and is dismissed. The rule is discharged. All interim orders are vacated.

20. There will be no order as to costs.