

(1991) 12 AP CK 0040
In the Andhra Pradesh High Court
Case No : Writ Petition No. 1 of 1990

Sujatha Rubbers	Vs	APPELLANT
Income Tax Officer and Another		RESPONDENT

Date of Decision : 18-12-1991

Acts Referred:

Income Tax Act, 1961 — Section 133A, 137, 139, 139(8), 148

Citation : (1992) 1 ALT 204 : (1992) 102 CTR 152 : (1992) 194 ITR 355

Hon'ble Judges : P. Venkatarama Reddi, J; M.N. Rao, J

Bench : Division Bench

Advocate : Y. Ratnakar, for the Appellant; S.R. Ashok, for the Respondent

Judgement

M.N. Rao, J.—At issue in this writ petition is the legality of the order passed by the Commissioner of Income Tax, Visakhapatnam, dated October 5, 1989, respondent No. 2 herein, u/s 273A of the Income Tax Act, 1961, dismissing the application of the petitioner herein, a partnership firm carrying on business in Vijayawada, represented by its managing partner, for waiver of interest in respect of the assessment years 1982-83, 1983-84 and 1984-85 :

"since the conditions of section 273A are not satisfied."

2. The Government of India introduced a scheme called amnesty scheme to encourage assesses to file returns voluntarily assuring them that no penal action for concealment of income would be initiated if returns were filed as laid down in the scheme. The said scheme was in force from November 15, 1984 to March 31, 1987. On March 27, 1986, during the currency of the amnesty scheme, the petitioner for the assessment years 1982-83, 1983-84 and 1984-85 were completed by the first respondent, Income Tax Officer, D-Ward, Circle-II, Vijayawada, and he levied interest in respect of the completed assessments under sections 139(8) and 217 of the Income Tax Act as detailed below :

----- Assessment Date of
completion Interest under Interest under year of assessment section 139(8) and

217	-----	(Rs.)	(Rs.)
1982-83	25-3-1987	6,310	6,794
1983-84	25-3-1987	5,648	2,688
1984-85	25-3-1987	4,719	6,041
-----		16,677	15,528

3. Contending that no penalties were imposable in respect of the returns filed under the amnesty scheme, the petitioner preferred appeals to the Deputy Commissioner of Income Tax (Appeals), Vijayawada, who, by his order dated November 29, 1989, allowed the appeals and directed cancellation of penalties. We are informed by Shri S. R. Ashok, learned standing counsel for the Income Tax Department, that against the appellate orders of the Deputy Commissioner dated November 29, 1989, the Department has preferred appeals to the Income Tax Tribunal and the same are now pending. Simultaneously, while pursuing the remedy by way of appeals in relation to the levy of penalties, the petitioner made an application on June 17, 1987, before the second respondent, Commissioner of Income Tax, for waiver of interest u/s 273A of the Act. That application was dismissed by the Commissioner holding :

"I find that the income disclosed by the assessee in the returns filed on July 23, 1986, is not true and full. In all the years under review, the Income Tax Officer has levied penalties u/s 271(1)(c) and according to the provisions of section 273A (1), in cases where proceedings u/s 271(1)(c) are initiated, the income disclosed by such assessee cannot be considered as a true and full disclosure. Moreover, in the instant case, the assessee has filed the revised returns of income on July 23, 1986, after survey operations had been conducted u/s 133A on July 9, 1986. It may be also stated here that the disclosure made by the assessee is out of fear which is clear from the fact that the assessee has made the disclosure only after the survey operations conducted by the Department u/s 133A on July, 9, 1986. Had there been no survey operations, the assessee would not have come forward with the disclosure. I will seek support for this proposition from the decision of the Allahabad High Court in the case of Hakam Singh and Others Vs. Commissioner of Income Tax, . In view of this discussion, I will dismiss the assessee's petition since the conditions of section 273A are not satisfied."

4. Shri Y. Ratnakar, learned counsel for the petitioner, contends that the Commissioner's view that the returns filed after the commencement of survey operations are not "voluntary", is erroneous. Equally objectionable is the view that the returns were filed by the petitioner, out of fear, and therefore, they are not voluntary.

5. Opposing these contentions, Shri S. R. Ashok, learned standing counsel for the Revenue, asserts that the conduct of the petitioner disentitles him from claiming the benefit of waiver of interest u/s 273A. A return filed after the survey operations have commenced will lose its voluntariness; fear of detection of concealed income was the real motive that prompted the petitioner to file the

revised returns and, therefore, they are neither voluntary returns nor can good faith be discerned in them.

6. Before considering the rival contentions advanced before us, it is necessary to notice section 273A which confers power on the Commissioner to refuse or waive interest is concerned, the material portion of the section reads :

"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, - ...

(iii) reduce or waive the amount of interest paid or payable under sub-section (8) of section 139(8) or section 215 or section 217 or the penalty imposed or imposable u/s 273,

if he is satisfied that such person - ...

(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 and 217, or where no 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..."

7. It is not in dispute that, in respect of the three assessment years, revised returns were filed by the petitioner on March 27, 1986, when the amnesty scheme was in operation. It is also not in controversy that survey operations in relation to the petitioner had already begun by the date of the filing or the revised returns under the amnesty scheme.

8. The definite stand taken in the counter-affidavit is that survey operations had commenced on July 9, 1986, and, in the course of the said operations, the petitioner furnished addresses of certain creditors to the Inspector of Income Tax who, on conducting an enquiry on July 10, 1986, could not locate the alleged creditors, and, on July 11, 1986, the Income Tax Officer issued a letter to the managing partner to produce the creditors duly posting the case to July 16, 1986 and, thereafter, it was further adjourned to July 23, 1986.

"Confronted with the factum of non-traceability of the creditors and the mechanic sheds where they were reportedly working, the assessee came forward with the revised returns. Thus, it is very clear that only after the survey operations and the gathering of the relevant material which proved the falsity of the claim of the petitioner, he chose to file revised returns making disclosure."

9. The file produced before us does not show that, on July 11, 1986, the Income Tax Officer issued a letter to the petitioner to produce the alleged creditors from whom certain amounts were claimed to have been borrowed by the assessee as disclosed in the original returns. In fact, it was only on August 4, 1986, long after the revised returns were filed by the assessee, that such a letter was issued by the Income Tax Officer. On July 9, 1986, summons were issued u/s 137 of the Income Tax Act to the petitioner to produce the day book, ledger and bank account copies for the three periods specified therein, on July 11, 1986. The proceedings as recorded by the Income Tax Officer on July 11, 1986, disclose that, in response to the summons issued on July 9, 1986, the managing partner of the petitioner-firm was present and he was requested to produce the 18 persons said to be the creditors of the firm on July 16, 1986. The managing partner was also examined on July 11, 1986. On July 16, 1986, the matter was adjourned to July 17, 1986, as the officer was on leave. A representation was made by the petitioner for a short adjournment to July 23, 1986, to produce the creditors and, accordingly, the request was granted. On July 23, 1986, a letter was filed before the Income Tax Officer stating that revised returns were filed for the relevant years. It was only after the revised returns were filled that the Income Tax Officer issued a communication dated August 4, 1986, calling upon the petitioner to produce the alleged creditors. The record also contains an "enquiry report" dated July 10, 1986, of the Income Tax Inspector to the effect that the three persons mentioned in the report and said to be the creditors of the petitioner "appear to be non-existent". What transpired up to July 11, 1986, according to the file, is that the Income Tax Inspector was asked to enquire about three of the creditors of the petitioner and he submitted a report on July 10, 1986, stating that the three persons were not available at the addresses furnished to him. What emerges from a perusal of the record is that the petitioner has not been told at any time before he filed the revised returns on July 23, 1986, that his alleged creditors were fictitious persons and, therefore, the transactions were bogus. No doubt, a survey was conducted by the date of filing the revised returns and some sort of enquiry by the Income Tax Officer was in progress at that time, but the petitioner cannot be attributed with any knowledge of the probable result of these enquiries or any adverse material appearing against him.

10. The only question that has to be considered is whether the petitioner in the revised returns filed on July 23, 1986,

"voluntarily and in good faith made full and true disclosure of his income"

as statutorily obligated under sub-clause (c) of clause (iii) of sub-section (1) of section 273A.

11. According to the impugned order, the revised returns were filed by the petitioner for two reasons : (1) they were filed "after survey operations were conducted u/s 133A on July 9, 1986"; and (2) "the disclosure made by the assessee is out of fear which is clear from the fact that the assessee has made

the disclosure only after the survey operations were conducted by the Department u/s 133A on July 9, 1986".

12. There is no allegation that the disclosure made in the returns were not full and true. There is also no finding that the disclosure made was not in good faith. The file shows that information regarding three of the several creditors of the petitioner was not definite at that stage. The report of the Inspector that they were not available at the addresses furnished to him was a confidential one and it cannot be presumed that the petitioner became aware of the said report. In a case where a return was filed by an assessee after he was apprised of any adverse material leading to a real apprehension of penal action against him, his return could not be construed to the voluntary within the meaning of section 273A. But that is not the fact situation here. Survey operations followed by enquiries which have not even progressed to the extent of the assessee being apprised of the alleged adverse material collected against him could not be construed as relevant factors for rejecting the returns filed by such an assessee as not voluntary if they contained "full and true disclosure of his income."

13. The second ground on which the impugned order is based, viz., that it was out of fear because of survey operations, that the petitioner made the disclosure, slides into the first ground to a very large extent, the exclusionary part being fear as the motive prompting the assessee to file the return. We think, this ground is totally irrelevant. There is no basis for presuming that free will or a sense of commitment to the well being of the State always propels the citizens to pay taxes. An honest and well-informed citizen never consciously commits default in the payment of taxes even if the law does not contemplate penal action for non-payment is at the bottom of the success of any tax legislation and the Income Tax Act is no exception to this; Chapter XXI of the Act deals with the penalties imposable.

14. We are, therefore, inclined to think that the expression "voluntarily" occurring in sub-section (1) of section 273A could not be construed in isolation with reference to the general animus or state of mind of the assessee. From the legal obligation to file a return, no element of fear could be either attributed or inferred. The word "voluntarily", in the context of section 273A, therefore, has to be construed as filling of the return by the assessee without being prompted by the animus to avoid or prompt adverse exposure or penal action. The Commissioner, before rejecting the returns as not voluntary, must have material based upon which it is reasonable to infer that, in all probability, but for the filling of the "voluntary" return, the assessee would have been subjected to penal action or adverse exposure. In other words, "out of fear, an assessee has made full disclosure", by itself, without anything more, cannot be a ground for not exercising the discretion u/s 273A. The fear must be traceable to the imminent or proximate exposure of the assessee to penal action but for the filling of the voluntary return u/s 273A and, in order to enquire into this subjective element, there must be in existence objective facts warranting such an inference.

15. The Commissioner sought support for the conclusions reached by him from the decision of the Allahabad High Court in *Hakam Singh and Others Vs. Commissioner of Income Tax*, . In that case, the business premises of the assessee were searched by the Income Tax Department and certain books were seized on November 22, 1973. Nearly eleven months thereafter, on October 7, 1974, returns were filed and a notice was issued on March 25, 1975, by the Income Tax Officer u/s 148 alleging escapement of income from assessment. Penalty proceeding were also initiated for the delay in filing the returns. These facts clearly show that there was little scope for the assessee to escape from the penal consequences and so, very rightly, the Commissioner of Income Tax held that the return filed was not voluntary u/s 273A. The Allahabad High Court, after distinguishing the decision of the Gujarat High Court in *Madhukar Manilal Modi Vs. Commissioner of Wealth Tax, Gujarat-V, and Another*, wherein it was held that the word "voluntary" applies to disclosure of wealth but not, to filing of returns, sustained the action of the Commissioner, in the particular facts of that case, in refusing to grant relief u/s 273A. The earlier view of the Allahabad High Court in *Mool Chand Mahesh Chand Vs. Commissioner of Income Tax and Another*, that a return filed in order to save oneself from a possible penal action cannot be termed as "voluntary" was followed. The facts in *Hakam Singh and Others Vs. Commissioner of Income Tax*, are neither parallel nor similar to the facts of the case on hand and, therefore, the finding that the return filed in that case was not "voluntary" could not constitute a valid ground for refusal by the second respondent-Commissioner to exercise discretion u/s 273A.

16. The decision of the Gujarat High Court in *Madhukar Manilal Modi Vs. Commissioner of Wealth Tax, Gujarat-V, and Another*, relates to waiver of penalty by the Commissioner u/s 18(2A) of the Wealth-tax Act. The crucial words in section 18(2A) that fell for consideration before the Gujarat High Court that the assessee,

"... Voluntarily and in good faith made full disclosure of his net wealth,"

are identical to the expressions used in section 273A of the Income Tax Act. The wealth-tax returns for two earlier years were filed in that case only after the assessee was asked to do so in the course of the assessment proceedings for the year 1971-72. His request for wavier of penalty was rejected by the Commissioner on the ground that the returns filed by him were not voluntary. The Gujarat High Court held that the expression "voluntary" should not be read in the context of filing of return, but it should be read with the expression "made full disclosure of his net wealth". With great respect to the learned judges, we are unable to accept the reasoning. A return which contains true and full disclosure need not necessarily be a voluntary return. When the element of voluntariness is absent because of supervening factors like imminence of adverse exposure, "voluntariness" disappears although the return filed may contain a true and full disclosure. As a rule, therefore, it cannot be said that if the return filed contains a full disclosure, it automatically becomes "voluntary" irrespective of the

circumstances under which the same was filed.

17. In *A.N. Sarvaria Vs. Commissioner of Wealth Tax, Delhi I and another*, a learned single judge of the Delhi High Court has taken the view that the filing of the return under the Wealth-tax Act after the survey operations had commenced would not render the return "not voluntary" when the return contained full disclosure of the wealth and no concealment was detected. *HIRA SINGH Vs. COMMISSIONER OF WEALTH-TAX, PATIALA, AND ANOTHER.*, arose under the Wealth-tax Act. For two assessment years, the assessee, in his returns, disclosed the extent of his agricultural lands as 24 acres, 6 kanals but for the subsequent two years the extent shown by him was 9 acres 7 kanals, on the ground that his share was reduced in a partition between him and his sons. The Wealth-tax Officer accepted the extent mentioned in the returns for all the years were filed by the assessee without the issuance of any statutory notice. The Commissioner waived penalties for the assessment years 1970-71 and 1971-72 but declined to grant the relief for the remaining years. As the petitioner had correctly disclosed the particulars of his land in returns which he filed before the statutory notices were issued, the Punjab and Haryana High Court ruled that the return filed was voluntary and, on the view, set aside the order of the Commissioner of Wealth-tax.

18. In *S.R. Jadav Desai Vs. Wealth Tax Officer (Sixth) and Another*, the Karnataka High Court had taken the view that if, without notices, returns were filed under the Wealth-tax Act without any compulsion, they must be treated as voluntary returns. The following statement of law enunciated by Venkataramiah J., (as he then was), in *Shankara Apaya Swami Vs. Wealth Tax Officer, Belgaum and Another*, :

"The expression "voluntarily" means "without compulsion" and "good faith" means "with due care and caution". Hence, if the return filed by the assessee does not show that he should be considered as having satisfied the above condition"

was followed.

18. The Kerala High Court, in *Alukkas Jewellery Vs. Commissioner of Income Tax*, preferred the view that, if a return was filed without any pressure or duress, it may be treated as voluntary. In that case, consequent on a search conducted in the premises of the assessee, both residential and business, certain books of account and jewellery were seized. In that context, viewing the overall conduct of the assessee, the Commissioner rejected the application filed u/s 273A and the same was sustained by the Kerala High Court.

19. It will thus be seen that the conclusions reached in the persuasive precedents cited by both sides turned upon the facts of each case and no precise legal principle of general application is deducible from them.

20. The question was viewed by the Commissioner from a wrong perspective. He

left that the returns were filed after the survey operations were completed and that is what is discernible from the words,

"after conducting survey operations u/s 133A on July 9, 1986, the revised returns were filed."

21. The extent of the progress made in the survey operations we have already referred to supra, after going through the record placed before us. Without considering the effect of the survey operations on the conduct of the assessee, the Commissioner reached the conclusion that the returns filed were not voluntary and this conclusion is clearly impermissible in law. The discretion conferred upon the Commissioner u/s 273A also compels him to take into account relevant factors and eschew irrelevant factors from consideration. The aspect of fear that is alleged to have prompted the assessee in filing the revised returns which was made out as a ground for not exercising discretion u/s 273A is in our view an irrelevant factor in the context of the failure of the Commissioner in not giving reasons indication the genuine link between the fear and the probability of exposure to penal action.

22. The extant legal position in the domain of public law as to the parameters of exercise of statutorily ordained discretionary powers is well-settled :

"... a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said and often is said, to be acting "unreasonably". (Per Lord Greene M. R. in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1947] 2 All ER 680.

The above English principle of public law was accepted by our Supreme Court in Rohtas Industries Vs. S.D. Agarwal and Others, .

For these reasons, we hold that all the three revised returns filed by the petitioner must be construed to be "voluntary returns" within the meaning of section 273A(1) of the Income Tax Act, and accordingly, we set aside the impugned order passed by the Commissioner of Income Tax dated October 5, 1989, allow the writ petition and remit the matter to that authority to consider the case of the petitioner afresh in the light of this judgment and pass appropriate orders in accordance with law. There shall be no order as to costs.