

(1981) 08 CAL CK 0010

In the Calcutta High Court

Case No : Income-tax Reference No. 369 of 1979

Sunderdas Thackersay and Bros.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 31-08-1981

Acts Referred:

Income Tax Act, 1961 — Section 271(1)
Income Tax Rules, 1962 — Rule 13

Citation : (1982) 26 CTR 290 : (1982) 137 ITR 646 : (1982) 8 TAXMAN 199

Hon'ble Judges : Sabyasachi Mukharji, J;C.K. Banerji, J

Bench : Division Bench

Advocate : S. Bhattacharji, for the Appellant;S.K. Mitra and S.K. Chakraborty, for the Respondent

Judgement

Sabyasachi Mukharji, J.—In this reference u/s 256(1) of the I.T. Act, 1961, the Tribunal has referred the following question to this court:

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that penalty u/s 271(1) was leviable in this case ?"

The assessment year involved is 1970-71. The assessee was required to file its Income Tax return by 30th June, 1970, for the assessment year 1970-71. The return, however, was filed on the 28th October, 1970. It was claimed before the ITO that the assessee had applied in Form No. 6 but no evidence could be produced in support of this claim. In the absence of any explanation, the ITO imposed a penalty of Rs. 10,386 u/s 271(1)(a) of the I.T. Act, 1961. The ITO, as mentioned hereinbefore, did not take into consideration the application filed in Form No. 6, which was filed by the assessee, after the time for filing of the return had expired. The ITO proceeded to say that no evidence was produced by the assessee. The ITO did not say that he looked into the records and found that such an application was not filed. The ITO thereafter went on to observe that the assessee offered no explanation for the delay in filing the return. In the premises, it appears to us, the ITO proceeded to say that the assessee had

offered no explanation for delay on the assumption that the return or the application in Form No. 6 was not filed.

2. The assessee went up in appeal before the AAC. The AAC upheld the order of the ITO. He found that there was no evidence that the delay in filing the return was due to any reasonable cause. According to him, applying for an extension was not a reasonable cause and even this application was made on the 29th August, 1970, when the date for filing of the return had expired in June, 1970. The AAC did not admit any further evidence regarding the filing of the return or of the application in Form No. 6 and he, therefore, upheld the penalty. The AAC seems to have proceeded on the basis that the original evidence, viz., the explanation, for the delay in filing the return, in Form No. 6 and he, therefore, upheld the penalty. The AAC seems to have proceeded on the basis that the original evidence, viz., the explanation, for the delay in filing the return, in Form No. 6 was not produced before the ITO. When the matter came up in appeal before the Tribunal, it upheld the imposition of the penalty. Before the Appellate Tribunal, an affidavit of the partner of the assessee-firm was filed with a memo, of appeal where it was stated that the adjustment of the accounts was delayed due to the constant ill-health of the accountant of the firm. It was in these circumstances that an application in Form No. 6 had been filed. It was pointed out that the ITO had not at all considered the contentions of the assessee made in Form No. 6 and in that view of the matter, it was contended by the assessee, that the order was bad in law and could not be upheld. The satisfaction for the imposition of penalty was with the ITO and he could not be so satisfied without looking into the reasons advanced by the assessee. The Tribunal found that the application in Form No. 6 was filed after the due date had already passed and, therefore, the ITO was not under any obligation to take into consideration that application particularly when there was no prima facie valid ground mentioned in the application explaining the delay in filing the application for extension of time. The Tribunal, further, held that the assessee had 8 months' time to file the return, and as the assessee had not been able to do so there was no valid reason for the delay in the filing of the return. In the premises, the Tribunal upheld the order passed by the AAC. In these circumstances, the question as mentioned hereinbefore, was referred to this court. In the affidavit, as mentioned hereinbefore, the assessee stated as follows :

"2. The Income Tax return in respect of the income of the said firm relating to the Income Tax assessment for the year 1970-71, was due to be filed on 30th June, 1970. Due to his constant ill health, my accountant. Shri Laxmidas, could not finally adjust the accounts of the firm, well in time, to enable me to fill up the return form in connection with the Income Tax assessment for the year 1970-71 and file it by the due date, namely, 30th June, 1970. As the completion of the accounts was being delayed, I applied in Form No. 6 (the prescribed form) to the Income Tax Officer, "D" Ward, Hundi Circle, Calcutta, for an extension of the date of filing the firm's return to 1st March, 1971, and filed application on 29th October, 1970.

In compliance with the notice u/s 274 of the I.T. Act, 1961, I appeared before Sri D. Bhattacharjee, the Income Tax Officer, "D" Ward, Hundi Circle, Calcutta, along with Sri B.P. Dutta, advocate, on 27th January, 1975. I submitted that the filing of the return had been delayed due to the delay in final adjustment of the accounts for the year concerned, by reason of the accountant's ill-health and that I had applied for an extension of time till 31st March, 1971. The Income Tax Officer did not ask me to produce the evidence for filing the application in Form No. 6. I, therefore, had no occasion to produce the receipt for filing the said Form 6 which I had been carrying with me in the file."

The question is, whether the Tribunal was right in upholding the order of penalty. On behalf of the assessee, it was contended that Form No. 6 itself indicated that the application could be filed after the expiry of the time for the filing of the return. Form No. 6 provides as follows:

"Form No. 6: u/s 139(1)/(2)/(3) of the Income Tax Act, 1961 -

I/We have to file the return

of my/our income

the income of... in respect of which I/we are assessable

for the assessment year commencing on the 1st April, 19; before

19 .For the reasons given below,

it is not possible

has not been possible

for me/us to file the return before the said date."

Neither Rule 13 nor Section 139 of the I.T. Act provides that no application can be filed after the period has expired. Therefore, in our opinion, the non-consideration of the application by the ITO was unjustified, specially when the application was, in fact, filed. It was furthermore improper for the ITO to say that the assessee had not produced any evidence. The I.T. Act itself has imposed several liabilities upon the assessee but the ITO should at least try to find out if it (the evidence) is in the records, primarily. Here, there is no evidence that the ITO did so and could not find it. Quite apart from saying, it appears to us, whether there was sufficient cause or not, it must primarily be found out by the ITO concerned, specially in a case of imposition of penalty. This view is corroborated by this court in the case of Commissioner of Income Tax Vs. A.K. Das, , where it was held that the satisfaction must primarily be of the ITO. See in this connection the observations of the court at p. 47 of the decision. It appears to us that the ITO should have taken into consideration this application explaining the delay. The Full Bench of the Orissa High Court in the case of Commissioner of Income Tax Vs. Gangaram Chapolia, held that the taxing authorities must be satisfied that the failure to furnish the return in time was

without reasonable cause. The burden of proof of reasonable cause u/s 271(1) was on the assessee as the matter was within his special knowledge. This burden could be discharged by a preponderance of probabilities as in a civil case and not necessarily by proof beyond reasonable doubt. We are in agreement with the view expressed by the Orissa High Court. There the Full Bench of the Orissa High Court observed, *inter alia*, as follows (p. 618):

"Language of the section is plain that mere failure to file the return in time would not entail imposition of penalty. The concerned taxing authorities must be satisfied that failure to furnish the return in time is without reasonable cause. The cause why the assessee did not furnish the return in time lies within his special knowledge. The burden of proof of that fact is on him. He should, therefore, indicate the cause with full particulars in his explanation for the satisfaction of the Revenue. He would also be in a position to substantiate the cause by independent evidence or from the materials available in the records of the department. The duty of the assessee does not end by merely showing any cause. The cause shown must be such that it would be acceptable as reasonable. Though penalty proceedings are quasi-criminal in nature, the language of the clause gives clear indication that the assessee is to prove to the existence of reasonable cause by preponderance of probabilities as in a civil case and not beyond reasonable doubt. If the cause shown may reasonably be true, the explanation of the assessee is to be accepted even though he may not be able to prove the truth thereof beyond reasonable doubt."

The Full Bench of the Kerala High Court in the case of Commissioner of Income Tax Vs. Gujarat Travancore Agency, held that the view of the Tribunal that the omission to file a return within the time stipulated either by Section 139(1) or by a notice u/s 139(2) must be proved by the Department to be without a reasonable cause, was not correct. The mere use of the expression "without reasonable cause" could not import a mental element of *mens rea*. Before the imposition of a penalty u/s 271, what was required was that the officer must be satisfied, not arbitrarily but judicially, that any person has without any reasonable cause failed to furnish the return or has concealed the particulars of his income. The fulfilment of the condition required is that there must be an absence of a reasonable cause and this fact has to be objectively found by the assessing authorities in the light of the explanation offered by the assessee. On behalf of the Revenue, however, our attention was drawn to the decision in the case of Assam Frontier Veneer and Saw Mills Vs. Commissioner of Income Tax, . There, the Gauhati High Court held that the ITO was not obliged to take into consideration an application for the extension of time to file a return in pursuance of the notice u/s 139(2) of the I.T. Act, 1961, made by the assessee in accordance with Form No. 6, Rule 13 of the Income Tax Rules, 1962, when it was admittedly submitted long after the due date for filing the return, unless there were *prima facie* valid grounds taken therein explaining the reasons for the delay. We are, with respect, unable to accept this view specially when there is no time-limit imposed u/s 139 or Rule 13 or in Form No. 6 itself. On the contrary, as

we have mentioned before, Form No. 6 itself postulates that such an application could be filed after the expiry of the time to file the return. Similar view was taken by the Andhra Pradesh High Court in the case of T. Venkata Krishnaiah and Co. Vs. Commissioner of Income Tax, . There it was held that the application for an extension of time was not received in time by the ITO, that is to say, on or before September 16, 1963, within which time the assessee was required to file its return as per a notice under Sub-section (2) to Section 139, and the ITO, therefore, was competent to levy penalty in those circumstances. For the same reasons as we have mentioned before, we are unable to agree with this view of the Andhra Pradesh High Court.

3. As we have mentioned before, the ITO did not consider the explanation and did not consider whether there was a good explanation or a reasonable cause or not. Learned advocate for the Revenue further contended that the Tribunal has held that there was no reasonable cause and this was a finding of fact. In support of this contention, he has referred first to the decision of the Delhi High Court in the case of SHIV SHANKAR LAL Vs. COMMISSIONER OF GIFT-TAX., . Here, the first question is whether the satisfaction must primarily be, for an imposition of penalty, with the ITO. The second aspect which is important is whether Form No. 6 stipulated that the explanation should be taken into consideration. These two aspects were not present before the Delhi High Court. If a finding is arrived at by a wrong reading of the section, that is to say, from a wrong reading of the provisions of law, that no application could be filed after the expiration of the time for filing the return, then, in our opinion, such a finding of fact cannot be said to be binding on this court, nor that finding of the Tribunal that there was no reasonable cause could substitute the finding that is necessary to be made by the ITO for the imposition of the penalty. To the same effect is the decision of the Punjab & Haryana High Court in the case of Commissioner of Income Tax Vs. R.B. Jodhamal Bishan Lal Kuthiala, . Whether there was a reasonable cause for the delayed filing of a return was a question of fact normally and it was held that no question of law therefrom arose. But, here, the Tribunal has arrived at a finding of fact without considering the relevant provisions of law. The next decision on which reliance was placed was of the Kerala High Court in the case of Commissioner of Income Tax Vs. Smt. P.K. Noorjehan, . This case, as such, did not deal with this aspect at all.

4. In the aforesaid view of the matter, we are of the view that the Tribunal was wrong in deciding for itself whether a reasonable cause was shown while passing the order upholding the ITO's contention. The appropriate order should be, in our opinion, that the Income Tax Tribunal should remand the matter to the ITO with a direction to consider the application made by the assessee for an extension of time on merits and then pass a speaking order whether a reasonable cause was shown or not. Thereafter, the authorities concerned would proceed to pass orders accordingly.

5. We, therefore, answer the question by saying that the Tribunal was in error in

upholding the order of the ITO and the Tribunal should remand the matter for consideration of the application of the assessee for an extension of time by the ITO giving a reasonable opportunity to all parties concerned and thereafter should proceed to pass orders accordingly. The question is answered accordingly. Each party to pay and bear its own costs.

C.K. Banerji, J.

6. I agree.