
(2005) 01 JH CK 0031

In the Jharkhand High Court

Case No : Criminal Revision No. 749 of 2003

Tata Robins Fraser Ltd.

APPELLANT

Vs

State of Jharkhand and Others

RESPONDENT

Date of Decision : 25-01-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 245, 482
Income Tax Act, 1961 — Section 143(3), 154, 250, 254, 271

Citation : (2005) CriLJ 2318 : (2006) TaxLR 105 : (2005) 4 JLJR 462 : (2005) 3 JCR 397 : (2005) 2 EastCric 73 : (2005) 2 Crimes 495 : (2005) 2 BLJR 1347 : (2005) 197 CTR 156 : (2005) 275 ITR 268

Hon'ble Judges : S.J. Mukhopadhyaya, Acting C.J.

Bench : Single Bench

Advocate : K.N. Jain, S.L. Agrawal and Indrajeet Sinha, for the Appellant; K.K. Jhunjhunwala and , Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

S.J. Mukhopadhyaya, Actg. C.J.

1 This revision application has been preferred by the petitioner against the order dated July 19, 2003, passed by the Special Judge (Economic Offence) at Jamshedpur in Case No. C/1-441 of 1992, whereby and whereunder, he refused to discharge the accused persons u/s 245 of the Cr. P. C. for the offence punishable under Sections 276C and 277 of the Income Tax Act, 1961 (hereinafter referred to as "the Act").

2. The petitioner of the present case in M/s. T.R.F. Ltd., a company registered under the Indian Companies Act (hereinafter referred to as "the company"), having its works at Burmamines, Town Jamshedpur, District--Singbhum (East).

3. The case of the petitioner is that the company filed its Income Tax return for the financial year 1982-83 (assessment year 1983-84) on September 23, 1983. In the said return, the company declared a total loss of Rs. 1,80,85,820. Income

was assessed u/s 143(3) of the Act at a total income of Rs. 16,85,510. The company claimed deduction of Rs. 1,77,03,141 being the demand on account of excise duty raised by the Superintendent of Central Excise during the financial year 1982-83. An amount of Rs. 9,23,000 was also debited in the profit and loss account of the company under the head "Provisions for warranty expenses".

4. The Revenue made assessment u/s 143(3) of the Act on March 25, 1986, disallowing the expenditure claimed on two accounts i.e., (i) excise duty amounting to Rs. 1,77,03,141, and (ii) warranty expenses of Rs. 9,23,000. The company, thereafter filed an appeal before the Commissioner of Income Tax (Appeals) (hereinafter referred to as "the CIT(A)) on April 23, 1986, against the assessment order dated March 25, 1986, but it was rejected by the Commissioner of Income Tax (Appeals) on October 25, 1989, who confirmed the order of the Assessing Officer dated March 25, 1986.

5. In December, 1989, the company preferred appeal before the Income Tax Appellate Tribunal. During the pendency of the said appeal, on April 10, 1990, the Deputy Commissioner of Income Tax passed penal order u/s 271(1)(c) of the Act imposing penalty of Rs. 1,00,05,486. Against the order of penalty dated April 10, 1990, a separate appeal was preferred by the company on May 7, 1990, before the Commissioner of Income Tax (Appeals). The said appeal was dismissed by the Commissioner of Income Tax (Appeals) on August 31, 1990, affirming the order of penalty imposed by the Deputy Commissioner, Income Tax.

6. So far as the order of penalty is concerned, the company moved against the order of the Commissioner of Income Tax (Appeals) and preferred an appeal before the Income Tax Appellate Tribunal on November 15, 1990. When both the appeals, one against the original assessment order and another against the order of penalty, were pending before the Income Tax Appellate Tribunal, the Income Tax Department filed a complaint petition on June 20, 1992, before the Special Court (Economic Offences) at Muzaffarpur against the company and all the directors who were on company's board on September 28, 1983, now pending in the Special Court (Economic Offences) at Jamshedpur.

7. In the complaint petition, registered as Complaint Case No. 441 of 1992, it was alleged that the company filed the return on September 28, 1983, declaring the total loss of Rs. 1,80,85,820. The income was assessed u/s 143(3) on total sum of Rs. 16,85,510. The company had claimed deduction of Rs. 1,77,03,141 being the demand on account of excise duty raised by the Central Excise Department, Jamshedpur, during the financial year 1982-83. This demand is in respect of the contract executed by the company relating to the earlier years and up to December 31, 1981. The claim of the accused company was not allowed and a sum of Rs. 1,77,03,141 was added to the total income of the assessee company. It was also alleged that an amount of Rs. 9,23,000 was debited in the profit and loss account of the company under the head "Provision for warranty expenses". It was disallowed and added to the total income of the assessee-company. For this addition, a penalty proceeding u/s 271(1)(c) of the Act was

initiated during the course of the assessment proceeding and a penalty of Rs. 1,00,05,500 was imposed. It was pleaded that the facts and circumstances established that the accused persons wilfully attempted to evade tax by furnishing incorrect particulars of income. The return was signed and verified by the accused Shri H. P. Bodhiwala, director, on behalf of the accused. It was also alleged that as the accused persons had made a statement in verification of return under the Act and under the rules framed thereunder-and the statement made was false which they either knew or believed to be false or did not believe to be true and as such the accused persons have committed offence punishable under Sections 276C and 277 of the Act.

8. The Special Court (Economic Offences), Jamshedpur, took cognizance on June 20, 1992, against the accused persons and ordered to issue summons against them. The petitioner company thereafter filed a petition u/s 482, Cr. P. C, at the Patna High Court for quashing the entire proceeding. The case was registered as Cr. Misc. No. 6252 of 1993. On May 11, 1993, the Patna High Court after hearing learned counsel appearing on behalf of the petitioner-company, including learned senior counsel appearing on behalf of the Revenue, allowed the petitioner to withdraw the application with liberty to move the High Court again after disposal of the appeal, as was pending before the appellate authority. The court while permitted to withdraw the application, directed the trial court not to proceed with case until and unless the appeal pending before the competent authority is disposed of.

9. The Income Tax Appellate Tribunal by its order dated March 25, 1994, passed in I.T.A. No. 34 (Patna) of 1990 (assessment year 1983-84), allowed the demand of excise duty as allowable expenditure. The Tribunal held that there is merit in the case of the assessee and found from the assessment order right from the assessment year 1981-82 onwards that the Revenue had accepted that the assessee had been maintaining its books of account on the mercantile system of accounting. Though, it was found that in some of the schedules forming part of the accounts and the notes appended thereto, the assessee-company mentioned about the mixed system of accounts, but ultimately, it was the mercantile system of accounting which was accepted by the Revenue. The Tribunal held that the assessee-company is entitled to claim deduction for being accrued as a statutory liability in the assessment year under consideration. The order passed by the Commissioner of Income Tax (Appeals) was held to be "not justified" and it was reversed by the Tribunal.

10. Regarding warranty expenses of Rs. 9,23,000 the Tribunal held that the matter in issue is controversial, on which the Commissioner of Income Tax (Appeals) had not given any finding on the merits. So the Tribunal while setting aside the order passed by the Commissioner of Income Tax (Appeals) restored back the appeal to his file to examine the claim relating to warranty expenses afresh and pass fresh order in accordance with law.

11. On July 7, 1994, the Deputy Commissioner of Income Tax passed

consequential order u/s 250 of the Act complying with the order and the decision of the Income Tax Appellate Tribunal and relief was allowed to the assessee-company, deducting an amount of Rs. 1,77,03,141.

12. The Revenue, i.e., the Income Tax Department thereafter filed a miscellaneous case registered as M. A. No. 26 (Patna) 1994 for rectification of the order dated March 25, 1994, on the ground that certain facts, judicial pronouncement, evidence, etc., were not taken into consideration by the Bench while accepting the claim of the assessee. The said M. A. No. 26 (Patna) of 1994 was disposed of on October 19, 1995. A Bench of the Tribunal directed for readjudication of the claim of the assessee. The assessee-company, thereafter prayed to the Vice-President of the Tribunal that the issue be readjudicated altogether by a different Bench since it apprehended that a definite view was formed by the Bench which passed the order on the miscellaneous petition filed by the Department. Accordingly, another Bench was constituted to readjudicate the claim. The appeal I. T. A. No. 34 (Patna) of 1990 (assessment year 1983-84) was heard afresh, whereinafter, the Tribunal by its order dated November 5, 1996, held as follows :

" . . In our opinion, it is admitted position that the impugned liability arose for the first time on the basis of demand notice issued by the Excise department on September 29, 1982, in respect of certain transactions or work carried on by the assessee which was never brought to tax by the Excise Department in earlier years and the assessee was also of the definite view that the work was not exigible to the excise duty and this view was upheld by the apex court. Therefore, the assessee was entitled to appropriate deduction on the basis of notice of demand received for the first time in respect of altogether new liability raked up during the previous year . . . Besides the statement in the accounts is for the purpose of information to the shareholders. Again when a company states in published accounts the accounting system being mixed system of accounting, a further question arises as to what transactions are recorded on mercantile basis and what transactions are recorded on receipt basis. Normally in the company accounts, certain receipts, say for example, cash compensatory and draw back receipts are shown on the basis of actual receipts and not on the basis of accrual following prudential norms and in that event also, the system of accounting would be classified as mixed one. Keeping this aspect in mind as also the evidence considered by the Tribunal while passing the original order, such aspect averment and the findings, recorded therein etc., we are of the opinion that this factual contention has to be rejected. . . ."

13. Counsel for the petitioner while referring to the aforesaid facts submitted that there was no concealment on the part of the petitioner or its directors. All figures, particulars, etc., were disclosed and thereby, it cannot be stated to be a case of non-disclosure to bring it within the purview of Section 276C for the purpose of penalty. The order of assessment having varied, the basis of penalty-having changed, the penalty order cannot survive nor the petitioner or its

directors can be prosecuted u/s 276C. In the absence of any evasion of tax, the criminal proceeding is uncalled for.

14. It was further submitted that the foundation of the complaint having been demolished, the continuance of the prosecution is illegal and unjustified.

15. Mr. K. K. Jhunjhunwala, learned counsel for the Revenue, submitted that the matter relating to warranty expenses of Rs. 9,23,000 was not pressed by the petitioner, at the time of hearing, before the Commissioner of Income Tax (Appeals). In spite of the same, the Tribunal remanded the issue for determination by the Commissioner of Income Tax (Appeals). He relied on a decision of the Supreme Court in the case of P. Jayappan Vs. S.K. Perumal, First Income Tax Officer, Tuticorin, , wherein the Supreme Court observed that the result of a proceeding under the other Act may not be binding on the criminal court. The criminal court has to judge the case independently on the evidence placed before it.

16. Counsel for the State referred to Section 279(1A) of the. Act to suggest that the company is not entitled to claim protection under the said provision, which reads as follows :

"A person shall not be proceeded against for an offence u/s 276C or Section 277 in relation to the assessment for an assessment year in respect of which the penalty imposed or imposable on him under Clause (iii) of Sub-section (1) of Section 271 has been reduced or waived by an order u/s 273A." The further case of the Revenue is that the accused persons on behalf of the assessee having wilfully made wrong statement of verification which he knew to be false or which be believed to be false within the meaning of Section 277 of the Act, they committed offence on two counts, i.e., u/s 276C as well as Section 277 of the Act, both of which are punishable with rigorous imprisonment extending to three years and with fine being the maximum sentence. It was informed that the Special Court (Economic Offences), Muzaffarpur, by its order dated June 20, 1992, had already taken cognizance of the offences under Sections 276C and 277 of the Act.

17. It appears that on the second appeal preferred by the assessee (petitioner) before the Income Tax Appellate Tribunal, Patna Bench (camp at Jamshedpur), vide its order dated March 25, 1994, passed in I. T. A. No. 34 (Patna) of 1990 observed that the matter, in issue, is a controversial point on which the Commissioner of Income Tax Officer (Appeals) has not given any finding on the merits. In that view of the matter, the Income Tax Appellate Tribunal set aside the order of the Commissioner of Income Tax (Appeals) and restored back the same to its original file to examine and decide the matter afresh and to pass a fresh order.

18. It is informed by counsel for the Revenue that the Income Tax Department has moved before this court and filed a case for reference being Tax Case No. 21 of 1998 (R), wherein they have raised the question of admissibility of excise duty.

19. In the present case, the question arises as to whether in view of the judgment rendered by the Income Tax Appellate Tribunal in favour of the company, the criminal proceeding for alleged offence, under Sections 276C and 277 of the Income Tax Act is called for or not.

20. The word "concealment" as mentioned in Section 271 of the Act and the provision of Section 276C of the said Act, both fell for consideration before the Supreme Court in the case of K.C. Builders and Another Vs. The Assistant Commissioner of Income Tax, . In the said case, the Supreme Court held as follows (page 569) :

"The word "concealment" inherently carried with it the element of mens rea. Therefore, the mere fact that some figure or some particulars have been disclosed by itself, even if it takes out the case from the purview of non-disclosure, it cannot by itself take out the case from the purview of furnishing inaccurate particulars. Mere omission from the return of an item of receipt does neither amount to concealment nor deliberate furnishing of inaccurate particulars of income unless and until there is some evidence to show or some circumstances found from which it can be gathered that the omission was attributable to an intention or desire on the part of the assessee to hide or conceal the income so as to avoid the imposition of tax thereon. In order that a penalty u/s 271(1)(iii) may be imposed, it has to be proved that the assessee has consciously made the concealment or furnished inaccurate particulars of his income."

21. While interpreting the provision of Section 276C of the Act, which deals with wilful attempt to evade tax, etc., and the provision of Section 277, which deals with false statement in verification, etc., and Section 278B which deals with the offences by a company, the following observation was made by the Supreme Court in the aforesaid case (page 573) :

"In the instant case, the penalties levied u/s 271(1)(c), were cancelled by the respondent by giving effect to the order of the Income Tax Appellate Tribunal, in I.T.A. Nos. 3129-3132. It is settled law that levy of penalties and prosecution u/s 276C are simultaneous. Hence, once the penalties are cancelled on the ground that there is no concealment, the quashing of prosecution u/s 276C is automatic.

In our opinion, the appellants cannot be made to suffer and face the rigorous of criminal trial when the same cannot be sustained in the eyes of law because the entire prosecution in view of a conclusive finding of the Income Tax Tribunal that there is no concealment of income becomes devoid of jurisdiction and u/s 254 of the Act, a finding of the Appellate Tribunal supersedes the order of the Assessing Officer u/s 143(3) more so when the Assessing Officer cancelled the penalty levied.

In our view, once the finding of concealment and subsequent levy of penalties u/s 271(1)(c) of the Act has been struck down by the Tribunal, the Assessing Officer has no other alternative except to correct his order u/s 154 of the Act as

per the directions of the Tribunal. As already noticed, the subject matter of the complaint before this court is concealment of income arrived at on the basis of the finding of the Assessing Officer. If the Tribunal has set aside the order of concealment and penalties, there is no concealment in the eyes of law and, therefore, the prosecution cannot be proceeded with by the complainant and further proceedings will be illegal and without jurisdiction. The Assistant Commissioner of Income Tax cannot proceed with the prosecution even after the order of concealment has been set aside by the Tribunal. When the Tribunal has set aside the levy of penalty, the criminal proceedings against the appellants cannot survive for further consideration. In our view, the High Court has taken the view that the charges have been framed and the matter is in the stage of further cross-examination and, therefore, the prosecution may proceed with the trial. In our opinion, the view taken by the learned magistrate and the High Court is fallacious. In our view, if the trial is allowed to proceed further after the order of the Tribunal and the consequent cancellation of penalty, it will be an idle and empty formality to require the appellants to have the order of the Tribunal exhibited as a defence document inasmuch as the passing of the order as aforementioned is unsustainable and unquestionable."

22. In the present case, the part of the assessment as was originally made against the assessee-company for the financial year, in question, was set aside by the Appellate Tribunal and certain reliefs were granted.

23. So far as the amount of Rs. 9,23,000 towards warranty expenses is concerned, the Tribunal remanded the matter before the Commissioner of Income Tax (Appeals) for a fresh decision and the matter is pending.

24. The original order of assessment having been modified and the assessment of the financial year in question, thereafter, having not reached its finality, the question whether the assessee-company evaded tax or not, cannot be determined at this stage.

25. Counsel for the Revenue could not lay his hands on any order or record to suggest that after remand, a fresh order of assessment has been passed by the assessing authority. No order imposing penalty can be passed till a fresh assessment order is issued.

26. In the case of K.C. Builders and Another Vs. The Assistant Commissioner of Income Tax, , the Supreme Court has observed that where addition or alteration is made in the assessment order, on the basis of which penalty for concealment was levied, there remains no basis at all for levying penalty for concealment and, therefore, in such a case, no such penalty can survive and the same is liable to be cancelled. The Supreme Court further observed (page 569) :

"Ordinarily, penalty cannot stand if the assessment itself is set aside. Where an order of assessment or reassessment on the basis of which penalty has been levied on the assessee has itself been finally set aside or cancelled by the Tribunal or otherwise, the penalty cannot stand by itself and the same is liable to

be cancelled as in the instant case ordered by the Tribunal and later cancellation of penalty by the authorities." In the said case, the Supreme Court further held (page 576) :

"It is a well-established principle that the matter which has been adjudicated and settled by the Tribunal need not be dragged into the criminal courts unless and until the act of the appellants could have been described as culpable."

27. For the discussions as made and reasons as shown above, I hold that the criminal proceeding, in question, being Case No. C/1-441 of 1992, pending in the Court of Special Judge (Economic Offence) at Jamshedpur, is uncalled for. Pendency of such case will not serve the interest of any of the party, the original order of assessment having been modified. In the circumstances, the proceeding aforesaid, i.e., Case No. C/I-441 of 1992, pending before the Court of Special Judge (Economic Offence) at Jamshedpur is quashed. This application is allowed.