
(1987) 02 AP CK 0029

In the Andhra Pradesh High Court

Case No : Income-tax Case No. 126 of 1980 & Referred Case No. 30 of 1980

V. Hari Prasad

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 17-02-1987

Acts Referred:

Income Tax Act, 1961 — Section 271, 271(1), 274(1), 275, 276C(1)

Citation : (1987) 167 ITR 603

Hon'ble Judges : M.N. Rao, J;K. Ramaswamy, J

Bench : Division Bench

Advocate : Y. Ratnakar, for the Appellant; M.S.N. Murthy, for the Respondent

Judgement

K. Ramaswamy, J.—This reference made u/s 256(1) of the Income Tax Act, 1961 (43 of 1961), for short "the Act", by the Appellate Tribunal is at the request of the assessee. He, as an individual, returned his income for the assessment year, 1971-72 of Rs. 30,000 for the previous year ending March 31, 1971. During the assessment proceedings it was found that in the 13th raffle conducted on November 15, 1970, by the Andhra Pradesh Welfare Fund, in his capacity as secretary thereof, one Mattaparthi Sriramulu of Vanapalli village of East Godavari District won the first prize for the ticket bearing No. 400760. He approached the assessee through the services of Sri L. Mlakondaiah, the District Collector of East Godavari. The assessee purchased it on November 18, 1970, and paid a sum of Rs. 2,50,000 to Sri M. Sriramulu and in turn he sold the ticket to Kumari Alpana, daughter of one Dr. Mohanlal Peermal of Bombay, for a sum of Rs. 3,50,000 with the services of one Diwakar Setty, to whom he paid a sum of Rs. 5,000 as commission; thereby he earned an income of Rs. 95,000 which the assessee did not disclose in his returns. Similarly, for the ticket bearing No. Y 934608 which won the second prize of Rs. 25,000 by one Sri Shankaraiah of Seetharampuram, Jangaon Taluk of Warangal District, the assessee paid him a sum of Rs. 21,000 and sold it to one Sri Chunilal L. Vyas for Rs. 28,000 and earned a profit of Rs. 7,000. He did not disclose in his return either the source of Rs. 21,000 or profit

of Rs. 7,000 earned thereon. This income of Rs. 1,23,000 was added to his income. This order was ultimately upheld by the Income Tax Appellate Tribunal and the assessment has become final. Thereafter, the Inspecting Assistant Commissioner initiated penalty proceedings u/s 271(1)(c) of the Act for concealment of the income thus found. Initially, notice was given to the assessee. On receipt thereof, it is claimed, that Sri S. Ramamohan Rao, chartered accountant, who appeared before the Inspecting Assistant Commissioner on behalf of the assessee, and even appeared during the assessment proceedings, and who has stated that he had nothing more to add to what he had already submitted before the appellate authorities and asserted that the assessee did not indulge in any clandestine activities as stated by the Revenue. Then, an order imposing penalty of Rs. 2,46,000 was made on July 28, 1976, and it was served on the assessee on July 29, 1976. The assessee carried it in appeal to the Income Tax Appellate Tribunal. Before the Appellate Tribunal, the assessee as well as Sri Rammohan Rao, the chartered accountant, filed affidavits on February 15 and February 17, 1977 respectively, contending that no adequate opportunity was given before imposing the penalty and it is violative of the principles of natural justice. Accepting the averments made in those affidavits, the Appellate Tribunal, by order dated August 16, 1977, directed the Inspecting Assistant Commissioner to give an opportunity to the assessee and the Department to adduce evidence afresh and to submit the report. Accordingly, the Inspecting Assistant Commissioner gave adequate opportunity. It may be mentioned that in respect of the same transaction, a complaint was laid to the police that the assessee committed offences punishable under sections 409 and 420 of the Indian Penal Code, 1860. The police investigated into the crime and a charge-sheet was laid. The assessee adduced both oral and documentary evidence; the witness produced by him were cross-examined at length and the Department produced the statements of Sriamulu, Shankaraiah, Sri L. Malakondaiah (District Collector), Divakar Setty etc., recorded u/s 162, Criminal Procedure Code, 1898 by the police during the investigation. The Inspecting Assistant Commissioner considered the evidence and by his order dated June 1, 1978, submitted his report to the Appellate Tribunal. Thereafter, the Appellate Tribunal has heard the assessee and the Department and held that the assessee had deliberately concealed an income of Rs. 1,23,000 attracting penalty u/s 271(1)(c) of the Act. The imposition of penalty was upheld, but, however, the maximum penalty of Rs. 2,46,000 was reduced to Rs. 1,23,000 by order dated September 15, 1978. Arising from that order are two questions referred to this court for opinion thus :

"(1) Whether, on the facts and in the circumstances of the case, the order of the Inspecting Assistant of Income Tax levying penalty u/s 271(1)(c) of the Income Tax, 1961, was violative of the provisions contained in section 274(1) of the Income Tax Act and the Tribunal should have quashed the order as invalid on that ground alone ?

(2) Whether, on the facts and in the circumstances of the case, the remand order

of the Tribunal dated August 16,1977, requiring the Inspecting Assistant Commissioner to go into the penalty proceeding afresh is valid in law in view of the provisions contained in section 275 of the Income Tax Act ?"

2. Sri Ratnakar, learned counsel for the assessee, raised three-fold contentions in support of the reference. Firstly, he contended that the initial order passed by the Inspecting Assistant Commissioner on July 28,1976, imposing the penalty is in violation of the principles of natural justice; therefore, it is per se void. Penalty proceeding are criminal proceedings. Therefore, the Appellate Tribunal ought to have set aside the order and left it open to the Inspecting Assistant Commissioner to take actions afresh, if the law so permits. Instead, the Appellate Tribunal remanded the matter, called for the findings and then disposed of the matter on merits. This is in clear violation of the law in filling up the gaps created by the Revenue and it is impermissible. In support thereof, he placed strong reliance on *Bir Singh and Others Vs. State of Uttar Pradesh*, . It is next contended that penalty proceedings being criminal in nature, except the evidence placed during the assessment proceedings, there is no fresh evidence brought on record by the Department; therefore, the evidence collected during the assessment proceeding cannot be relied upon for the purpose of imposition of penalty. The Revenue initiated and passed penalty order at the fag end of the limitations. The appellate order does not cure the bar of limitation. It is impermissible in law. He further contended that the explanations offered by the assessee are clearly acceptable; he did not indulge in any clandestine business; there is no conclusive evidence brought on record to establish that the assessee has indulged in any clandestine business and concealed the income and, therefore, the penalty cannot be imposed. The question that arises for consideration is whether the procedure adopted by the Tribunal is valid in law ? Section 254 of the Act deals with the powers of the Appellate Tribunal to dispose of the appeal and it reads thus : "254. (1) The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit."

3. Therefore, the power and jurisdiction of the Appellate Tribunal are of wide amplitude and depending upon the exigencies in a given case it has powers to pass such appropriate orders thereon as the justice of the case demands. The powers of the Tribunal are expressed in the widest possible terms similar to the powers of the civil appellate court u/s 96 and Order 41, Civil Procedure Code. In *Hukumchand Mills Ltd. Vs. Commissioner of Income Tax, Central Bombay and Others*, , the Supreme Court held that the words "pass such orders as the Tribunal thinks fit u/s 33 of the 1922 Act", include all powers (except possibly of enhancement) which are conferred on the Appellate Assistant Commissioner by section 31, to direct the Appellate Assistant Commissioner or the Income Tax Officer to hold further inquiry and to dispose of the case on that basis. One of the contentions therein was that the Tribunal has no powers of remand. The word "thereon" was construed and the court upheld the power of remand. In *T.M.S. Mohammed Abdul Kader Vs. Commissioner of Gift-Tax, Madras*, , the Madras High

Court, while interpreting the words "such orders as it thinks fit", held that they should not restrict the power of the Appellate Tribunal of an outright remand after setting aside the decision. It also includes the power to make an intermediate direction for the taking of additional evidence or for the giving of a fresh findings on the takings of such evidence by the Appellate Assistant Commissioner in order to enable the Tribunal to dispose of the appeal before it is on receipt of a report after the taking of evidence. It is thus clear that the words "as it thinks fir" are of wide amplitude to give a direction to authorities below to afford an opportunity to the assessee and the Revenue to adduce evidence afresh, to consider the same and to submit a report. Under Order 41, rule 25, Civil Procedure Code, the appellate court when it finds that an issue is essential to the right decision of the suit on merits which was not framed by the trial court, it can frame it and refer back to the trial court to return the evidence to the appellate court together with its findings thereon and the reasons therefor. The Appellate court then may dispose of the appeal on merits. Thus, we hold that even in an appeal against the order of penalty, the powers of the Appellate Tribunal is wide enough to include the power to call for a report after giving an opportunity to the assessee as well as the Revenue to adduce such evidence as it deems necessary for the purpose of disposal of the controversy in dispute. The assessee himself nursed the injury that he was given no. adequate opportunity before the penalty was imposed and, therefore, he sought for an opportunity being given. At his behest, the Appellate Tribunal acceded to it and instead of itself taking evidence, directed the Inspecting Assistant Commissioner to give full opportunity to the assessee and the Revenue and record evidence and to submit a report thereon. Can the assessee having had that opportunity, turn round and contend that them Tribunal is devoid of jurisdiction to call for a report but should have set aside the initial order and fold its hands ? In our view, it is impermissible. The Appellate Tribunal thought it expedient, with a view to do substantial justice, to adopt the above procedure and accordingly the report was called for. We find that the Tribunal has committed no illegality in calling for a report from the Inspecting Assistant Commissioner.

4. It is next contended that since the original dated July 28, 1976, itself is a void order, the voidity is not cured by calling for a fresh report and to consider the same. We are unable to agree.

5. The doctrine of natural justice is a facts of fair play in action. No person shall be saddled with a liability without being heard. In administrative law, this doctrine has been extended when a person is made liable in an action without being heard. The principles of natural justice decided on not supplant the law but merely supplement the law or even humanise it. If a statutory provision can be read consistent with the principles of natural justice do not supplant the law but merely supplement the law or even humanise it. If a statutory provision can be read consistent with the principles of natural justice, the court coul do so, for the Legislature is presumed to intend to act according to the principle of natural justice. Therefore, let us look at the statue whether audi alteram partem is made

its part and whether the action and infraction of the principles of natural justice are part of the statute. Section 274(1) of the Act provides that no penalty shall be imposed unless the assessee has been heard or has been given a reasonable opportunity of being heard. Therefore, when an order u/s 271(1)(c) is passed in violation of section 274(1), it is a statutory violation and thereby an illegality has crept in the order. It is amenable to correction u/s 245 of the Act. The order does not, thereby, become illegal and so long as it is not corrected in an appropriate proceeding, the order of penalty continues to be a valid order and binds the assessee. He cannot treat it as non est. and if he ignores it, he acts at his own peril.

6. In *Estate of Late Rangalal Jajodia Vs. The Commissioner of Income Tax, Madras*, Ray J. (as he then was), speaking for the court, has held that :

"As assessment proceeding does not cease to be a proceeding under the Act merely by reason of want of notice. It will be a proceeding liable to be challenged and corrected. Similarly, if there is a mistake as to name or there is a misdescription of the name, the proceeding will be liable to be challenged and corrected by giving notice to the assessee subject to such just exception as an assessee can take under law. The direction given by the Appellate Assistant Commissioner was to make fresh assessment on Aruna Devi in accordance with the provision of the Act."

7. A Division Bench of this court, of which one of us (K. Ramaswamy J.) was a member, in *Mohammadi Begum and Another Vs. Commissioner of Income Tax*, 673, has held :

"An order of assessment without giving to the assessee is not void. It is a generally accepted proposition of law that any administrative action taken in violation of the principles of natural justice is a nullity. It is an equally accepted proposition of law that such an order creates no legal obligations nor alters any legal relations. The argument is that the order passed by the Income Tax Officer in this case without notice to the assessee being non est, and the period of limitation fixed by the statute having overtaken his powers to reassess meanwhile, the process of reassessment cannot now be started by the Income Tax Officer. The order passed by the Income Tax Officer in violation of the principles of natural justice is still an order under the Act though liable to be corrected for the reason of its having been passed in violation of the principles of natural justice and is not a void order."

8. Therefore, the penalty order passed by the Inspecting Assistant Commissioner, though quasi-criminal in nature, still a proceeding initiated under the Act. Therefore, the order is not per se void but it is an illegal order. To cure that illegality, the Appellate Tribunal has adopted an intermediary course to give an opportunity afresh to both the parties to adduce evidence aliunde and to consider the evidence and submit a report. This procedure adopted by the Appellate Tribunal cures the illegality committed by the Inspecting Assistant

Commissioner and we do not see that any illegality has crept in in the procedure adopted by the Appellate Tribunal.

9. Penalty proceedings are quasi-criminal in nature. But the proceedings itself will not impose any impediment on the exercise of fundamental right to personal liberty of the assessee. In a case where the assessee is prosecuted and the same was remanded, certainly, it would be a case of giving an opportunity to the Revenue to fill up the gaps after remand. *Bir Singh and Others Vs. State of Uttar Pradesh*, it is clear that even in a criminal trial, the appellate court has power to remand a case but to a limited extent. The appellate court itself has power to take additional evidence in a suitable case, yet the discretion would be exercised sparingly but not to fill up the gaps or lacunae in the prosecution evidence. But each case has to be considered in the light of its own facts. Penalty proceedings are not in strict sense criminal proceedings. It is in the nature of quasi-criminal proceedings and the object of imposing penalty is to deter the assessee from concealing the income really earned by him or from furnishing false or inaccurate particulars in respect thereof.

10. Chapter XXI of the Act starts with the heading "Penalties impossible". Section 271 is, therefore, undoubtedly a penal proceeding, but is quasi-criminal in character. There is a marked distinction between prosecution for an offence punishable under the Act and proceedings to impose penalties under Chapter XXI. The touchstone in a prosecution is the "proof beyond reasonable doubt" and not "preponderance of probabilities". But the object of the penal proceedings is to stamp out the tendency of an assessee to evade compliance with the provisions of the Act without reasonable cause or the concealment of the income or furnishing inaccurate particular in proof of income. Thereby, it is intended to act as a deterrent on the assessee from evading tax or indulging in fraudulent fabrication of the record to keep the taxable income earned during the accounting year "beyond the ken of the tax net or to screen the income from taxation". In a criminal charge, unless the prosecution proves beyond reasonable doubt the offence committed by the assessee under the Act, the delinquent is entitled to the benefit of decided doubt and thereby goes scot free. The acquittal is on the technical rule of "presumed innocence". But, for levy of penalty, the standard of proof is not as rigorous as that of a charge for an offence. The test is "totality of circumstances". It is true, as held by the Supreme Court in *Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali*, that in a proceeding to impose penalty, the Revenue has to establish afresh by adducing evidence to show that the assessee has concealed the particulars of his income or furnished inaccurate particulars of such income. The evidence may consist of documentary, oral or circumstantial evidence. The evidence collected during assessment proceedings or finding recorded is good and also relevant. But it is not conclusive. If there is evidence adduced during penalty proceedings which tends to establish that the assessee has concealed the particulars of his income or furnished inaccurate particulars of such income, an inference may be drawn

therefrom that the conduct of the assessee is for concealment or furnishing of inaccurate particulars of income. Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases, the other facts can be inferred it is sought to establish. In some cases, the other facts can be inferred with as much practicality as if they had been actually observed. In other cases, the inference does not go beyond reasonable probability. If there are no proved positive fact from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture. The question, therefore, is whether there is evidence on record to draw the inference that the assessee has concealed the income of Rs. 1,23,000 ?

11. With a view to assuage the injury nursed by the assessee that he was denied opportunity envisaged u/s 274(1) and to comply with the statutory requirement thereof, the Appellate Tribunal felt it expedient to retain the appeal on its file, to call for a report from the Inspecting Assistant Commissioner, commanding him to record evidence afresh that may be adduced by the assessee and the Revenue so that it itself could consider the evidence to find whether the evidence so adduced enables the Tribunal to draw a conclusion or inference that the assessee has concealed the income of Rs. 1,23,000 before imposing penalty. The act or conduct of an assessee to conceal income is an inferential fact to be drawn or deduced from the totality of facts and circumstances. Evidence may consist of oral, documentary or circumstantial evidence. Adducing of evidence during the proceedings to impose penalty is not, in the strict sense, evidence under the Evidence Act which does not apply to proceedings under the Act. It would apply only if an assessee is prosecuted for an offence under the Act. Any material relevant to the point in controversy is evidence. The Supreme Court in D.M. Manasvi Vs. Commissioner of Income Tax, Gujarat, II Ahmedabad, , held that the findings given in assessment proceedings would be relevant and admissible material in penalty proceedings. Even the statements recorded u/s 161, Criminal Procedure Code, during the investigation, though unsigned by the maker thereof, may be relevant evidence. The only inhibition is that it cannot be pressed into service without supplying a copy thereof to the assessee so as to enable him to controvert, if he disputes the correctness of the contents thereof, if need be, by calling the maker for examination tendering his oral evidence. Both the Revenue as well as the assessee have adduced oral and documentary evidence. The statements recorded u/s 161, Criminal Procedure Code, of the two prize winners (viz., M. Sriramulu and Shankaraiah), Sri Malakondaiah (District Collector) and Diwakar Setty were supplied, they were examined and cross-examined at length. How far the statements u/s 161, Criminal Procedure Code, or evidence can be relied on or accepted or inference to be drawn therefrom in support or against the conclusion of concealment, are matters exclusively for the primary authority and the appellate forum, as fact-finding authorities. Therefore, the procedure adopted by the Appellate Tribunal is one of statutory compliance of section 274(1) but not "filling up gaps in the sense of a criminal trial." The Act itself

makes a distinction in using the phraseology in the relevant provisions for prosecution or penalty, like section 276C(1) - "Wilful attempt to evade tax", section 276CC - "Wilful failure to furnish particulars", etc. But u/s 271(1)(c), mere concealment is sufficient to impose penalty. Thus considered, the doctrine of "filling up gaps" does not apply to the penalty proceedings in Chapter XXI but would be applicable to prosecution under the Act.

12. It is true that section 275 creates a limitation on the exercise of power to impose penalties on an assessee. The Income Tax Officer or the Inspecting Assistant Commissioner, as the case may be, has to initiate and complete the penalty proceedings before the expire of the statutory period of limitation prescribed u/s 275. The exercise of the power by either authority is a statutory power. Therefore, it should be done within the limitation prescribed thereunder, lest it would become illegal and liable to assailment. Though the settled legal principle is that the power of the appellate authority is co-extensive with that of the original authority, the exercise of power by the Appellate Tribunal is not hedged in by any limitation. As see, the power of the Appellate Tribunal u/s 254 is of wide amplitude. Therefore, it is permissible to adopt such procedure conducive to the circumstances of a case so warranted. The bar of limitation which is imposed on the primary authority by section 275 does not apply to the appellate authority. Therefore, the expire of limitation is not an impediment in the way of the appellate authority to call for a report after giving reasonable opportunity to the parties to correct the illegality committed by the primary authority, i.e., the Inspecting Assistant Commissioner. Thus considered, we agree with the conclusions reached by the Appellate Tribunal, though for different reasons, that the assessee has concealed income of Rs. 1,23,000 and the imposition of penalty is legal. The reference is accordingly answered in favour of the Revenue and against of assessee. No costs.