(2007) 07 AHC CK 0172

Allahabad High Court

Case No: None

The Commissioner of Income Tax		APPELLANT
	Vs	
Bareilly Development Authority		RESPONDENT

Date of Decision: July 20, 2007

Acts Referred:

- Income Tax Act, 1961 - Section 139, 194C, 201, 221, 256

Citation: (2007) 213 CTR 100 : (2008) 299 ITR 394

Hon'ble Judges: Vikram Nath, J; R.K. Agarwal, J

Bench: Division Bench

Judgement

R.K. Agarwal, J.

The Income 1 ax Appellate Tribunal, New Delhi ha. referred the following question of law u/s 256(1) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") for opinion to this Court:

Whether on the facts and in the circumstance s of the case, the Tribunal was, in law, justified in cancelling the penalties amounting to Rs. 67,618/- and v. 1, 99, 888/- imposed u/s 201(1)/221 for the default during the financial years 1982-83 and 1983-84?

2. The reference relates to the Financial Years 1982-83 and 1983-84 in proceedings relating to imposition of penalty u/s 201(1)/221 of the Act.

3. The respondent assessee is a Development Authority. During the aforesaid financial years, the Development Authority failed to comply with the provisions regarding tax deducted at source from the amount paid to various contractors. It had also not filed the appropriate form with the Income Tax Department nor the amount of tax deducted at source from time to time was deposited by it. The Income Tax Officer initiated penalty proceeding u/s 221 of the Act and after considering the reply and the material on record, levied a total sum of Rs. 2, 67,510/-

as penalty. The aforesaid amount is the sum total of the various penalties levied for the default committed in different periods by the Development Authority.

4. Feeling aggrieved, the Development Authority preferred an appeal before the Appellate Assistant Commissioner of Income Tax, Bareilly, who, vide order dated 3.9.1986, had partly allowed the appeal granting a relief of Rs. 67,610/-.

5. In the second appeal preferred by the Development Authority, the Tribunal had allowed the appeal and cancelled the penalty levied by the Income Tax Officer in its entirety. While deleting the penalty, the Tribunal had held that where an assessee had paid tax on his own without any action or threat of action by the Income Tax Officer, penalty could not be properly levied. It had further held that the provision of Section 221 would show that the penalty under this section is discretionary and the discretion is to be exercised fairly and properly. A person who delays the payment of tax u/s 194C has to pay interest for the period of delay in terms of Section 201(1A) of the Act and, therefore, there is no justification for a penalty when the tax has already been paid. It had further held that the Income Tax Officer had adopted an ascending scale of penalty although the period of default was descending and was very nominal in respect of the last two items for which the maximum rate of penalty had been levied, which showed that the Income Tax Officer''s discretion to levy penalty on the Development Authority had not been fairly exercised. The Tribunal had further held that the Income Tax Officer had initiated action not because the tax was not paid but because form No. 26C was not submitted and, in its view, no penalty could be levied for default in furnishing form No. 26C in which details of tax deducted had to be furnished and the submission of such form was not a precondition for payment of tax deducted and the violation of Rule 27(2)(C) of the Rules, which required the person making the deduction of tax in accordance with Section 194C, to send to the Income Tax Officer in a statement in form No. 26C, could not be punished. The operative part of the Tribunal''s order is as follows:
For the above reasons, we are of the opinion that no penalty could be legally levied u/s 221(1) in the present case and in any case the levy of penalty being discretionary and the taxes having already been deposited, it was not a fit case for the levy of penalty being discretionary and the taxes having already been deposited, it was set a fit case for the deletion of penalty. Therefore, while allowing the assessee''s appeal we cancel the penalty levied by the ITO in its entirety. As a consequence the Revenue''s appeal shall stand dismissed.

6. We have heard Sri. A.N. Mahajan, learned Standing Counsel, appearing for the Revenue.

7. The learned Standing Counsel submitted that it is not in dispute that the Development Authority had failed to deduct the tax at source, as required u/s 194C of the Act and further it had failed to deposit the same with the Income Tax Authorities within the prescribed period. Thus, the penal provision of Section 221 of

the Act were fully attracted According to him. Explanation to Sub-section (1) of Section 221 of the Act specifically provided that the liability to any penalty under Sub-section (1) of Section 221 would not cease merely because the Development Authority had paid the taxes before the levy of such penalty. According to him, the view of the Tribunal that if the tax and interest had been paid before the issuance of the notice u/s 221 of the Act then the provisions of Section 221 are not attracted, was wholly misplaced and contrary to law. He further submitted that the Income Tax Officer had rightly exercised his discretion and levied penalty looking into the number of recurring default, which could not be said to be arbitrary. In support of his aforesaid pleas, he has relied upon the following decisions:

(i) Laxmi and Co. Vs. Commissioner of Income Tax,

(ii) Jubilee Investments and Industries Ltd. Vs. Assistant Commissioner of Income Tax and Others, and

(iii) Amin Chand Payarelal Vs. Inspecting Asstt. Commissioner, Income Tax and Others,

8. We have given our anxious consideration to the various pleas raised by the learned Counsel for the parties.

9. We find from the order of the Income Tax Officer that before initiating penalty proceeding u/s 201(1)/221(1) of the Act by issuance of a show cause notice dated 10.8.1984, the Income Lax Officer had issued a notice on 14.6.1984 inviting the attention of the Development Authority to the provisions regulating deduction of tax at source as also the consequences flowing from such default. The date fixed was 25.6.1984 on which date no body had appeared on behalf of the Development Authority. The Inspector of Income Tax was deputed to contact the officers of the Development Authority and to request them to submit form No. 26 at the earliest. The Inspector met the Deputy Secretary and the Secretary of the Development Authority and apprised them of the situation. Nothing was done by the Development Authority whereupon another notice dated 11.7.1984 was issued reiterating the consequences for non-compliance of the statutory provision regarding tax deducted at source. The date fixed for compliance was 20.7.1984. On 20.7.1984 the Development Authority through its counsel submitted its reply along with form No. 26C for the financial years 1982-83 and 1983-84. From the perusal of form No. 26C, so filed, the Income Tax Officer found that serious defaults have been committed with regard to the deposit of tax deducted at source during the aforesaid financial years and, therefore, a notice dated 10.8.1984 had been issued calling upon the Development Authority as to why penalty u/s 201(1)/221(1) of the Act should not be imposed. The plea taken by the Development Authority was that their officers were not aware about the statutory provisions regarding the deposit of tax and they were under the impression that it was to be deposited by the end of the financial year and from October, 1982 to June, 1983, there was no Accounts Officer

posted in the Development Authority and non person knowing the statutory provision was available with them. The default was neither deliberate nor there was" any mens rear. If was a semi government local authority and was not earning any benefit from the deduction of tax at source and as the alleged default was less than a period of one month, no penalty was imposable.

10. The plea taken by the Development Authority had not been accepted. From the order of the Tribunal, we find that it is not in dispute that that the Tribunal had set aside the penalty on three grounds, namely (1) tax and interest had been deposited before the penalty proceeding was initiated; (2) the Income Tax Officer''s discretion to levy penalty had not been fairly exercised; and (3) no penalty could be levied for non-filing of form No. 26C required under the provision of Rule 27(2)(C).

11. So far as the first ground is concerned, we are of the considered opinion that the view of the Tribunal that penalty can be imposed on the ground that the tax deducted at source and interest due thereon have already been paid before the initiation of penalty proceeding, is not correct. The Explanation to Section 221(1) of the Act specifically provides that the penalty shall not cease to be leviable on an assessee merely by reason of the fact that before the levy of such penalty, the assessee has paid the tax, puts the position beyond any pale of doubt that notwithstanding the fact that the tax and interest has already been paid by the assessee, the assessee can still be liable for penalty u/s 221(1) of the Act.

12. In the case of Laxmi & Co. (supra), this Court has held that the levy of interest for the delay in filing the return u/s 139 does not have the effect of absolving the assessee from the liability to pay penalty u/s 271(1)(a). The levy of interest does not have the effect of automatically extending the time for filing the return.

13. In the case of Jubilee Investments and Industries Ltd. (supra), the Calcutta High Court has held that whether the assessee had paid the interest or not is immaterial. When he is found in default in depositing the amount of the tax deducted at source within the time prescribed, he is liable to pay penalty and interest.

14. In the case of Amin Chand Payarelal (supra), the Apex Court has held that merely because Sub-section (4) of Section 139 enables the assessee to file the return in time before the assessment is made, it does not mean that the liability to pay penalty u/s 271(1)(a) is erased.

15. We are in respectful agreement with the aforementioned views. It is immaterial as to whether tax deducted at source and interest, if any, accrued thereon, has been paid prior to the initiation of penalty proceeding or alter the notice has been issued. The view of the Tribunal on this aspect cannot be sustained.

16. So far as the third ground for deleting the penalty, i.e., no penalty is exigible for non-filing of form No. 26C required under Rule 37(2C) concerned, we find that the show cause notice dated 10.8.1984 had been issued by the Income Tax Officer u/s

201(1)/221(1) of the Act after the Development Authority had filed form No. 26C and the Income Tax Officer had noticed the default. Even though no penalty is leviable u/s 221(1) of the Act for not furnishing form No. 26C, yet, in the present case, we find that the penalty proceedings have been initiated for violation of the provision of Section 201(1) of the Act. The Tribunal appears to have misdirected itself on this issue.

17. Now remains the deletion of penalty on the ground of fair exercise of discretion by the Income Tax Officer to levy penalty. The Tribunal while deleting the penalty, has held as follows:

In the present case as the chart placed as Annexure A to the penalty order would show, taxes deducted in the months of August to December, 1982 were actually paid on 21sl January, 1983. Taxes deducted in January-February, 1983 were paid on 31st March, 1983 and taxes deducted from April, 1983 to February, 1984 were paid on 1st March, 1984. According to the ITO, the proceedings for the levy of penalty were initiated in June, 1984 when no tax was in arrears. The ITO has levied a penalty of 30% for the taxes deducted in September-October, 1982 and paid on 21.1.1983 is after a little more than 4 months. He has levied penalty @ 70% for the tax that was deducted in February, 1984, could be paid by 7th March, 1984 and was actually paid on 31st March, 1984. He has thus adopted an ascending scale of penalty although the period of default was descending and was very nominal in respect of the last two items for which the maximum rate of penalty has been levied. This shows that the ITO''s discretion to levy penalty on the assessee has not been fairly exercised.

18. From a perusal of the aforesaid, we find the the Tribunal''s findings that the Income Tax Officer''s direction to levy penalty on the assessee had not been fairly exercised, are based on appreciation of evidence and material on record. This Court while giving its opinion in a reference does not sit in appeal over the findings recorded by the ''Tribunal, which are not perverse. Thus, we are of the considered opinion that the Tribunal had rightly deleted the penalty.

19. In view of the foregoing discussions, even though the order of the Tribunal on the point of law is not correct, yet on the issue of fair exercise of discretion we see no reason to interfere.

20. Accordingly, the question, referred to us, is answered in the affirmative, i.e., in favour of the assessee and against the Revenue. There shall be no order as to costs.