COMMISSIONER OF Income Tax, WEST BENGAL-IV Vs SMT. CHITRA MUKHERJEE.

Income-tax Reference No. 248 of 1973

Court: Calcutta High Court

Date of Decision: Aug. 19, 1980

Acts Referred:
Income Tax Act, 1922 â€" Section 33B#Income Tax Act, 1961 â€" Section 274

Citation: (1981) 21 CTR 254 : (1981) 127 ITR 252 : (1981) 5 TAXMAN 297

Hon'ble Judges: Sudhindra Mohan Guha, J; Sabyasachi Mukharji, J

Bench: Full Bench

Judgement

SABYASACHI MUKHARJI J. - The assessment year involved is 1962-63. The assessee failed to submit its return under s. 39(1) of the I.T.

Act, 1961, within time. Sri Ramanathan, the ITO, started penalty proceedings under s. 271(1)(a) against the assessee for late filing of the return

and issued a notice dated February 23, 1967, to the assessee to show cause why penalty should not be imposed. The said notice was served on

the assessee on March 17, 1967. The assessee did not offer any explanation in response to that notice. Thereafter, Sri Ramanathan was

transferred and he was succeeded by Sri N. K. Roy. The assessee states that he had no knowledge of succession and there is nothing on record

to show that the assessee had knowledge. The successor-ITO proceeded with the matter from the stage at which his predecessor had left it

without issuing any fresh notice either under s. 129 or under s. 274 of the I.T. Act, 1961, and imposed a penalty of Rs. 11,051.

The assessee, being aggrieved by the said order, appealed to the AAC. The assessee raised three contentions : (i) that notice under s. 274 was

never served on the assessee; (ii) that she was not informed of the change of the incumbent in office and that deprived her of the right to claim the

reopening of the penalty proceedings; and (iii) that the successor-ITO had no authority to pass the penalty order as the assessee had not been

heard as required under s. 274 of the Act. The AAC rejected the first two contentions of the assessee on the ground that the assessee had been

served with a notice under s. 274 and that as she did not claim the reopening of the penalty proceedings according to the proviso to s. 129 she lost

her right to claim the reopening of the penalty proceedings. With respect to the third contention, the AAC held that the successor ITO acted

without authority in imposing the penalty as the assessee had not been heard as required by s. 274 of the I.T. Act, 1961.

Being aggrieved by the said order of the AAC, the revenue went up in appeal before the Tribunal. After considering the rival contentions urged and

after taking into consideration the facts, the Tribunal noted that on behalf of the assessee it was admitted that the assessee had received a notice

under s. 274 issued by the predecessor-ITO. The Tribunal negatived the contentions of the revenue that the assessee should be presumed to have

known the change of the incumbent in the office on account of the notification of the appointment of the successor as it was not only that change

that the assessee was required to know but also whether the successor-ITO intended to proceed in the matter from the stage at which it was left

by the predecessor ITO. The Tribunal, in that view of the matter, was of the view that the AAC was right in holding that the successor-ITO had no

authority to pass the penalty order as the assessee had not been heard by him under s. 274 of the I.T. Act, 1961. The Tribunal, accordingly,

dismissed the appeal.

On these, under s. 256(1) of the I.T. Act. 1961, the Tribunal has referred the following two questions to this court :

1. Whether, on the facts and in the circumstances of the case and on correct interpretation of section 129 of the Income Tax Act, 1961, the

Income Tax Officer erred in continuing the penalty proceeding from the stage at which such proceeding was left by his predecessor, without

specifically informing the assessee of his intention to do so ?

2. If the answer to question No. 1 is in the negative, then, whether, on the facts and in the circumstances of the case and having regard to the fact

that no response was made to the notice u/s 274 of the Income Tax Act, 1961, issued by his predecessor-in-office, the Income Tax Officer had

no authority to pass an order of penalty u/s 271(1)(a) of the said Act, without giving the assessee a fresh opportunity of being heard ?

In order to dispose of these contentions, it is necessary to refer to s. 274 of the I.T. Act, 1961. Sub-section (1) of s. 274 provides that no order

imposing a penalty shall be made unless the assessee had been heard or has been given a reasonable opportunity of being heard.

Section 275 provides for the bar of limitation for imposing penalties and the Explanation thereto provides that in computing the period of limitation

for the purpose of this section the time taken in giving an opportunity to the assessee to be re-heard under the proviso to s. 129 should be

excluded. Section 129 of the I.T. Act, 1961, provides as follows :

Change of incumbent of an office. - Whenever in respect of any proceeding under this Act an Income Tax authority ceases to exercise jurisdiction

and is succeeded by another who has and exercise jurisdiction, the Income Tax authority so succeeding may continue the proceeding from the

stage at which the proceeding was left by his predecessor :

Provided that the assessee concerned may demand that before the proceeding is so continued the previous proceeding or any part thereof be

reopened or that before any order of assessment is passed against him, he be re-heard.

In this connection, in view of the contention urged in this case, it may be appropriate to refer to s. 5(7C) of the Indian I.T. Act, 1922, which is

more or less in similar terms with s. 129 of the I.T. Act, 1961, and it provided as follows :

5. (7C) Whenever in respect of any proceeding under this Act an Income Tax authority ceases to exercise jurisdiction and is succeeded by

another who has and exercises jurisdiction, the Income Tax authority so succeeding may continue the proceeding from the stage at which the

proceeding was left by his predecessor :

Provided that the assessee concerned may demand that before the proceeding is so continued the previous proceeding or any part thereof be re-

opened or that before any order for assessment is passed against him, he be re-heard.

In view of the decision of this court upon which reliance was placed, it is also material to refer to s. 33B of the Indian I.T. Act, 1922, which

provided, inter alia, as follows :

Power of Commissioner to revise Income Tax Officers orders. - (1) The Commissioner may call for and examine the record of any proceeding

under this Act and if he considers that any order passed therein by the Income Tax Officer is erroneous in so far as it is prejudicial to the interests

of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such enquiry as he deems

necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment or cancelling

the assessment and directing a fresh assessment.

(2) No order shall be made under sub-section (1) -

(a) to revise an order of reassessment made under the provisions of section 34; or (b) after the expiry of two years from the date of the order

sought to be revised....

It is well settled that penalty proceedings are not only quasi-judicial but also quasi-criminal. In order to impose penalty, the revenue has to

discharge its onus and there should be strict compliance with law. No, s. 274 specifically enjoins that reasonable opportunity should be given to the

assessee to be heard. Section 275 as well as the Explanation thereto provides for exclusion of the period in case of continuance of a proceeding by

a succeeding ITO, which was significantly not there under s. 33B of the Indian I.T. Act, 1922.

On behalf of the revenue, reliance was placed on a decision of this court in the case of Sadhan Kumar Roy Vs. Commissioner of Income Tax, .

There, this court was dealing with a notice under s. 33B of the Indian I.T. Act, 1922, and such a notice had been issued by the Commissioner in

respect of an assessment order dated September 4, 1961. In this reply dated August 29, 1963, the assessee had raised various contentions and

asked for an adjournment for three days for furnishing evidence. A different Commissioner, who had assumed charge in the meantime, had passed

an order on September 2, 1963, after refusing time. The assessees appeal to the Tribunal was dismissed. On a reference to this court, it was noted

that it was contended on behalf of the assessee that there was non-compliance with s. 5(7C) of the Act of 1922 inasmuch as the assessee was not

given a fresh hearing. Under s. 33B, it was necessary to pass the impugned order within two years from the date of assessment. It was emphasised

that under s. 5(7C) the assessee had a right to ask for a re-hearing by the changed Commissioner. But the assessee did not ask for a hearing

personally, but wanted time to adduce evidence. It was not the assessees case in the High Court that he had additional evidence on September 4,

1963. As was pointed out by the Tribunal, the assessee wanted to delay the passing of the order so that it could be barred by limitation. In the

circumstances, there was no non-compliance with the provisions of s. 5(7C) as was rightly held by the Tribunal. This court observed at page 957

of the report as follows :

Counsel for the assessee contended before us that in this case there was non-compliance with section 5(7C) of the Indian Income Tax Act, 1922,

inasmuch as the assessee was not given any fresh hearing. It had to be borne in mind that before the Tribunal the contention that was urged was not

that the assessee was not given any fresh hearing by Shri Palekar but the contention was that Shri Palekar being the succeeding officer should have

satisfied himself about the necessity for the issuance of the notices and proceeded with the matter afresh. Therefore, strictly speaking, the Tribunal

had no opportunity to deal with this contention. This contention would involve examination of certain facts as to the consequence of non-hearing

which were not raised before the Tribunal and as such it is not proper for us to entertain this objection. Even, however, assuming that the assessee

is allowed to agitate this question as another aspect of the question, we are unable to accept the contention urged on behalf of the assessee. As we

mentioned before, the impugned order was passed on the September 2, 1963; the assessment order in respect of which the order u/s 33B had

been passed was passed on the September 4, 1961. Therefore, under the operation of the relevant section as it stood in the 1922 Act the order

u/s 33B would have become barred after September 4, 1963. In the premises, it was imperative that the order, to be valid u/s 33B, it should have

been passed by the September 4, 1961. In that context we have to see the requirements of section 5(7C) of the Indian Income Tax Act, 1922.

The second proviso to the said section provides that in computing the period of limitation for the purpose of sub-section (3) of section 34, the time

taken for reopening would be extended if it became necessary to give fresh notice or if fresh hearing became necessary. But the proviso to the sub-

section does not make any kind of extension in respect of the proceedings u/s 33B of the Indian Income Tax Act, 1922. u/s 33B of the Indian

Income Tax Act, 1922, as mentioned hereinbefore, it was obligatory to have passed the impugned order within two years from the date of the

assessment.

In this connection, it is necessary to bear in mind that when an order under s. 33B is passed, only an assessment is reopened and the assessee is

given an opportunity to agitate the question again. But the position may be significantly different in the case of imposition of penalty which is a

quasi-criminal and quasi-judicial proceeding.

In this light, it is necessary to refer to the decision of the Andhra Pradesh High Court in the case of Anantha Naganna Chetty Vs. The

Commissioner of Income Tax, Andhra Pradesh, Hyerabad, , which is a case of penalty under s. 28(3) of the Indian I.T. Act, 1922.

The Calcutta High Court in the case of Kanailal Gatani v. CIT [1963] 48 ITR 262 was concerned with a situation which was different from the

present case. There the ITO had issued notice to the assessee to show cause why a penalty should not be imposed and, after hearing the assessee,

made a draft order for the imposition of penalty. He was then transferred and his successor, after looking into the papers, concurred with the order

of his predecessor and made an order imposing penalty after getting the sanction of the AAC. It was held by this court that the order of penalty

was not invalid merely because the succeeding officer who made the order had not heard the assessee himself. There, Sinha J. observed that the

hearing of a case might be of many kinds. It might involve the calling of witnesses, their examination and cross-examination and then advancing

arguments. Where witnessed had been called and examined or where the arguments had been advanced, it was clear that one man could not hear

the case and another man pass the judgment. The reason was that much might depend upon the view that the Tribunal took as to the credibility of

witnesses and his mind might be swayed one way or the other by the demeanour of witnesses and as a result of arguments. This is such an

intangible and personal task, that it could not be handed over to the successor. Where, however, no witness had been called and no argument had

been advanced, but the matter depended on written objections, the successor was in the same position as the officer who originally was in the

conduct of the case, and as long as the successor applied his mind to the materials before him an order made by him could not be held to be

invalid. The facts of the instant case, however, are significantly different because here the assessee had not filed any explanation, though he was

given notice, a fact upon which strong reliance was placed, that is to say, as we have emphasized, the penalty proceedings were not only quasi-

judicial but quasi-criminal also and the requirements of reasonable opportunity are requirements to be strictly followed unlike the requirements in

assessment proceedings or proceedings under s. 33B specially and where the Act itself by its section provides extension of time in case of re-

hearing by the succeeding officer.

We must also emphasize that in this case there was no specific case for hearing and there is nothing on record to show that the assessee had

knowledge of the fact that the successor-ITO proceeded with the matter from the stage at which his predecessor had left it. In the premises, the

Tribunal was correct and we answer the questions as follows :

Questions No. 1 is answered in the affirmative and in favour of the assessee.

In view of the answer we have given to question No 1, question No. 2 does not really arise. But we say that even in a case where no response had

been made to the notice under s. 274 of the I.T. Act, 1961, issued by his predecessor-in-office, the ITO had no authority to pass an order of

penalty under s. 271(1)(a) of the said Act, without giving the assessee a fresh opportunity of being heard.

In the facts and circumstances, each party will pay and bear its own costs.

SUDHINDRA MOHAN GUHA J. - I agree.