Peico Electronics and Electricals Ltd. Vs Deputy Commissioner of Income Tax and Others

Court: Calcutta High Court

Date of Decision: Aug. 5, 2004

Acts Referred: Constitution of India, 1950 â€" Article 226
Income Tax Act, 1961 â€" Section 142(1), 143(1), 143(2), 215, 217
Income Tax Rules, 1962 â€" Rule 40(1), 40(5)

Citation: (2005) 199 CTR 407 : (2005) 278 ITR 319

Hon'ble Judges: Kalyan Jyoti Sengupta, J

Bench: Single Bench

Advocate: Debi Pal, for the Appellant; D.K. Some, for the Respondent

Judgement

Kalyan Jyoti Sengupta, J.
By this application the petitioner has challenged an order dated December 4, 1989, passed by the Deputy

Commissioner of Income Tax, Special Range-I (respondent No. 1 herein), whereby and whereunder the petitioner''s applications for waiver

and/or reduction of interest under Rules 40(1) and 40(5) charged u/s 215 of the Income Tax Act, 1961 (hereinafter referred to as ""the said Act""),

for 23 months instead of 35 months has practically been rejected, granting for the period from March 1, 1986 to July 31, 1986. This application

was made by the petitioner-assessee in relation to the assessment year 1984-85.

2. It appears from the records that the first application was made under the provision of Rule 40(1) of the Income Tax Rules (hereinafter referred

to as ""the said Rules""). Subsequently, another application was made on behalf of the petitioner under the provision of Rule 40, Sub-rule (5). Both

these applications were heard out and disposed of by respondent No. 1 by the impugned order, of course, with reasons. It appears from the

impugned order that while rejecting the prayer of the petitioner, respondent No. 1 observed that the assessee maintains the accounts in such a way

that unless the previous year''s assessment is completed the next year''s cannot be taken up for consideration. The first hearing for the assessment

year of 1984-85 could be fixed on August 1, 1986, though the return was filed on July 26, 1984, and the assessment thereof was completed on

March 24, 1987. The case could not be taken up for consideration until the previous year''s assessment of 1983-84 was completed on February

24, 1986. Hence, the delay in taking up the case for hearing from March 1, 1986, to July 31, 1986, is held not attributable to the assessee and the

provisions of Rule 40(1) are applicable for this period. The officer concerned further reasoned that the company manages the accounts in such a

way that it is difficult to find the actual income, rather it helps suppress income. Consequently, a deep scrutiny and examination of accounts and

enquiries were necessary which is evident from the fact that in each year huge additions of income were made over and above the returned income.

The authorised representatives of the assessee could not produce before him any evidence that the circumstances of the company were such that a

reduction or waiver of interest was called for. As such, respondent No. 1 refused to exercise discretion under Rule 40(5) in favour of the

petitioner-assessee.

3. Factually, in this case the petitioner admittedly filed the return for the aforesaid assessment year on July 26, 1984, followed by filing of revised

computation in November, 1986. The assessment was taken up for the first time on August 1,1986, by issuing notices under Sections 143(2) and

142(1) of the Act. Consequently, the assessment was completed on March 24, 1987. Respondent No. 1 reduced the interest u/s 215 for five

months commencing from March 1, 1986 to July 31, 1986. The petitioner"s grievance is that excepting for the period as permissible under the

rules, the interest should have been waived till July 25, 1985, for twelve months.

4. Dr. Debi Pal, appearing for the writ petitioner, while assailing the impugned order submits that there was no fault on the part of his client for

which they should be held to be disentitled to claim waiver and/or reduction of interest for the above months. Within the stipulated time his client

filed returns; however, the Department took almost two years to start assessment. And this delay cannot be attributed to his client. Delay is on the

part of the Department. The reasons assigned in the impugned order are not judicially acceptable. Requirements of alleged deep scrutiny and

examination of the books of account are no ground to deny the petitioner"s right of having waiver under the aforesaid rules. Under the statutory

compulsion the company being a multinational one is to maintain accounts and it is quite normal that the accounts of the petitioner must be

elaborate and reasonable degree of complexity of the same is bound to occur. No reason has been assigned by the respondent as to why the

proceedings have been initiated after a lapse of two years. Besides, the allegations of maintaining the accounts calculated to suppress income are

falsified by the fact that no step was taken for realising penalty u/s 271(1)(c) of the said Act. He further contends that the officer concerned has

misunderstood the scope and purview of Rule 40(1) of the said Rules, which is basically different and distinct from the provision of Rule 40(5). His

further argument is that once it is established that the reasons for delayed assessment are not attributable to the assessee, the power coupled with

duty to grant waiver is a matter of course and mandatory. In support of his contention he has relied on the decisions of the Bombay High Court

reported in 89 ITR 144 and Commissioner of Income Tax Vs. Bennett Coleman and Co. Ltd., . He has also relied on a decision reported in Brig.

Brig. Anant Singh Vs. Commissioner of Income Tax and Others, . He distinguishes the decision of the Kerala High Court reported in Deputy

Commissioner of Income Tax Vs. P.M. Antony, cited by Mr. D. K. Some appearing for the Revenue. Dr. Pal submits that the aforesaid decision

was rendered on factually different circumstances, and moreover the same was rendered under Rule 40(5). Drawing my attention to Rule 40(5) of

the said Rules, he submits that in this case the discretion is certainly vested with the officer concerned as regards power of waiver, and such

discretion must be exercised judicially and not capriciously or whimsically.

5. Dr. Pal further submits that in this case the writ petition should not be thrown out at this stage as it has been admitted for hearing on affidavits.

The petitioner has raised the question of illegal and/or improper exercise of jurisdiction vested under Rule 40(1). Moreover, he contends that when

the writ petition has been admitted for hearing and the same is being heard after a long time, this should be heard on merit by this Court and the

petitioner should not be non-suited on the ground of so-called alternative remedy. In support of his submission he has relied on a decision of the

Supreme Court reported in Dhampur Sugar Mills Ltd. v. Union of India [2000] 122 ELT 333. He also contends that the plea of alternative

remedy will not be applicable in cases where the writ of certiorari is prayed for quashing a quasi-judicial order. He has referred to two Supreme

Court decisions reported in State of U. P. v. Mohammad Nooh, AIR 1958 SC 86, and Ram and Shyam Company Vs. State of Haryana and

Others, . He submits further that in this case no appeal is provided for under the statute, and as regards provision of revision, according to him, the

provision of revision is not an efficacious alternative remedy. Unlike the provision of appeal the power in the revisional jurisdiction is wholly

discretionary. This cannot be held to be an alternative remedy. In support of his contention he has drawn my attention to the following decisions :

Collector of Customs and Excise, Cochin and Others Vs. A.S. Bava, ;

Khatau Junkar Ltd. and another Vs. K.S. Pathania and another, ;

Bharat Commerce and Industries Ltd. Vs. Union of India and Others, ; and

L. Hirday Narain Vs. Income Tax Officer, Bareilly, .

6. Coming back to the merits of the case, Dr. Pal submits that the decision rendered by respondent No. 1 is patently perverse so much so that no

reasonable person or body properly informed could have come to or arrived at such a decision. In support of this portion of his contention he has

referred to a decision of the Supreme Court reported in Commissioner of Income Tax, Bombay and Others Vs. Mahindra and Mahindra Limited

and Others, . His next contention is that the provision of Rule 40(1) is not power simplicities but coupled with duty. It is a settled position of law

that when a power coupled with duty is asked to be exercised the same must be done when called upon to do so.

7. The plea of alternative remedy as raised by Mr. Some is, in my view, should not be entertained though such point was taken at the first instance.

As rightly argued by Dr. Pal the revisional jurisdiction cannot be an efficacious and alternative remedy to discourage the writ court to entertain the

writ petition. An efficacious and alternative remedy would be such effective machinery that the litigant can agitate all points both on fact and law.

The right of appeal is one of such alternative remedy as in the appellate jurisdiction one can raise all points regarding facts unlike the revisional

jurisdiction. Even in all situations an appeal cannot be said to be an alternative effective remedy as observed by the Supreme Court in the case of

Ram and Shyam Company Vs. State of Haryana and Others, . If the litigant is debarred from agitating all questions, I think the revisional provision

cannot be an efficacious and alternative remedy. The meaning of the word ""alternative"" is clear enough to suggest that all questions both procedural

and substantial can be decided by such a forum, which can be a substitute for the ordinary forum. I have examined the provisions of Section 264 of

the Income Tax Act, which appear to be the power of revision. From this provision I find that the petitioner cannot raise questions of fact and all

questions of law. In the case of Collector of Customs and Excise, Cochin and Others Vs. A.S. Bava, , the Supreme Court held that the existence

of remedy by way of revision does not bar jurisdiction of the High Court to entertain a petition under Article 226 of the Constitution of India.

Similar view was taken by the Supreme Court in L. Hirday Narain Vs. Income Tax Officer, Bareilly, . The Bombay High Court has taken the same

view in the case of Khatau Junkar Ltd. and another Vs. K.S. Pathania and another, . Moreover, this writ petition has been pending for a long time

as it was filed in 1990, fourteen years have gone by. If I dismiss the writ petition on this ground of alternative remedy then serious injustice would

be caused to the petitioner. Long pendency of the writ petition is a ground for entertaining it. This proposition of law is supported by the decision

of the Supreme Court reported in Dhampur Sugar Mills Ltd. v. Union of India [2000] 122 ELT 333. Mr. Some submits on the merits that the

application made by the petitioner is really under the provision of Rule 40(5) of the said Rules for waiver of interest. If this provision is closely

scrutinised, it will appear that the power is absolutely discretionary. Particularly, in this case the officer concerned has recorded reasons for refusing

to grant relief of waiver. The reasons may be good or bad. But the same should not be scrutinised in exercise of power of judicial review, for a writ

court cannot substitute its own reasoning in place of reasonings recorded by respondent No. 1.

8. Therefore, on this preliminary point the writ petition should be dismissed. He further submits that the order passed under Rule 40(5) cannot be

upset by the writ court. He has drawn my attention to a judgment of the Kerala High Court reported in Deputy Commissioner of Income Tax Vs.

P.M. Antony, and submits that the learned single judge set aside an order passed by the appropriate officials under Rule 40(1) of the said Rules.

However, the Division Bench had set aside the same observing that it is not for the court to substitute its own discretion in place of that of the

Assessing Officer.

9. I have considered the respective contentions of the learned advocates and examined the materials. I have gone through the impugned order of

the Assessing Officer. It appears to me that the Assessing Officer has recorded that returns for the assessment year was duly filed and the same

was completed almost after two years. The reasons given in the impugned order are that unless the previous assessment was completed, the

subsequent assessment could not be undertaken because it has got the chained connections and/or relations.

10. Mr. Some has rightly reminded me that the reasoning of the quasi-judicial authority should not be upset by the superior court in exercise of

power of judicial review. But this does not mean that patently absurd and irrational reasons should be supported because of limited jurisdiction. It

is not understood by this Court nor any reason is assigned as to why the previous assessment, namely, the assessment of 1982-83 could not be

completed within the time, if the same has connection with the subsequent assessment order. Therefore, this reason for delayed action by the

Assessing Officer is not acceptable as being rationally justified reasons, even applying the layman''s intelligence. Ordinarily the assessment should

have been completed within one year.

11. I find from the record that the application was initially made for waiver of the reduction and/or waiver of interest under Rule 40(1) of the said

Rules. I think while dealing with this aspect of the matter, respondent No. 1 has mislead and/or misdirected himself. While interpreting the provision

of Rule 40(1), I find substance in the argument of Dr. Pal that for exercise of jurisdiction under Rule 40(1) the only criteria to waive or reduce

interest chargeable u/s 215 or 217, as the case may be, is delay in assessment not being attributable to the assessee.

12. Rule 40(1) is set out as under :

40. Waiver of interest.--The Assessing Officer may reduce or waive the interest payable u/s 215 or Section 217 in the cases and under the

circumstances mentioned below, namely :

(1) when the relevant assessment is completed more than one year after the submission of the return, the delay in assessment not being attributable

to the assessee.

13. In a decision of the Bombay High Court reported in Khatau Junkar Ltd. and another Vs. K.S. Pathania and another, it was held amongst

others that the assessee was not responsible for delayed issuance of notice u/s 143(1)(a) and, in that case, the court granted relief to the assessee.

In another decision of the Bombay High Court reported in Commissioner of Income Tax Vs. Bennett Coleman and Co. Ltd., the Division Bench

of the same court held amongst others, if the case falls under Rule 40(1), that it is not open for the appropriate authority even to charge interest for

one year. In one case the Delhi High Court held Brig. Brig. Anant Singh Vs. Commissioner of Income Tax and Others, that if the delay occurred

on account of search and seizure of the assessee, the delay cannot be attributable to the assessee and, therefore, the interest u/s 215 is to be

waived.

14. Factually here the notice was issued after two years by the Department u/s 143(1) of the said Act intending to initiate the assessment.

Therefore, by no stretch of imagination this delay can be attributable to the assessee.

15. The reasons assigned by respondent No. 1 that by reason of maintaining complex accounting system the deep and detailed enquiry was to be

undertaken are, in my view, no basis and/or justification to refuse to grant appropriate relief under the aforesaid rules.

16. The decision cited by Mr. Some of the Kerala High Court in Deputy Commissioner of Income Tax Vs. P.M. Antony, is inappropriate in this

case as rightly argued by Dr. Pal because of the reason that factually in that case while making assessment it was found that the income of the

assessee partner was required to be enhanced for revision of the amount of dividend given by the firm on its assessment by reason of the fact that

the dividend derived from the partnership firm was revised because of the assessment of the partnership firm itself. On a comparative reading of

sub-rule (1) and sub-rule (5) it is clear that in the case of Sub-rule (5) unlike Sub-rule (1) the appropriate official is required to exercise discretion,

whereas under Sub-rule (1) no discretion is left. The only pre-condition, is to ascertain no fault or failure on the part of the assessee, once it is

done, exercise of power under Rule 40 (Sub-rule (1)) is a matter of course. It is also a duty cast upon the respondent officials to see whether any

fault lies with the assessee in the matter of assessment.

17. Respondent No. 1 has recorded that no case has been made out to exercise power under Rule 40(5). I think no case is required to be made

out. Specifically it is for the Assessing Officer to find out whether on the facts and circumstances, as it would appear from the record, discretion is

to be exercised under the aforesaid rules or not. As I have already observed as rightly contended by Dr. Pal, this case squarely falls within the

provision of Rule 40 (Sub-rule (1)).

18. Thus I am of the view that the impugned order is not sustainable under the law and the same is accordingly set aside. I direct the present

respondent No. 1 to rehear the application for waiver, following the observations recorded by me hereinabove and shall pass appropriate order

for reduction or waiver of interest, as justice of this case would require.

19. There will be no order as to costs.

20. The application is allowed to the extent above, the decision shall be rendered by the Commissioner within a period of eight weeks from the

date of communication of this order upon giving hearing to the petitioners and/or authorised representative by passing a speaking order.

21. An urgent Xerox certified copy of this judgment be made available to the parties, if applied for.