(1979) 03 BOM CK 0027

Bombay High Court

Case No: Income-tax Reference No. 211 of 1970

Lalta Prasad Goenka		APPELLANT
	Vs	
Commissioner of Income Tax, Central, Bombay		RESPONDENT

Date of Decision: March 2, 1979

Acts Referred:

- Income Tax Act, 1922 - Section 28

Citation: (1980) 122 ITR 399 : (1979) 2 TAXMAN 157

Hon'ble Judges: M.N. Chandurkar, J; Desai, J

Bench: Division Bench

Advocate: D.H. Dwarkadas, for the Appellant; R.J. Joshi, for the Respondent

Judgement

Chandurkar J.

1. In respect of the assessment year 1950-51, the assessee had filed a return of income on May 30, 1951, which was signed by his manager. A fresh return, however, came to be filed on March 30 1953. The assessment was completed on March 30, 1955. The conduct of the assessee prior to the completion of the assessment has been adversely commented upon by the ITO, the AAC and Tribunal. Notices under ss. 22(4) and 23(2) of the Indian I.T. Act, 1922, were issued to the assessee after March, 1953, after no effective response was received by the ITO in respect of his earlier notices. It was only on February 17, 1955, that the assessee admitted receipt of notices under ss. 22(4) and 23(2) of the Act and by that letter he informed the ITO that he had filed returns with the ITO, Calcutta. The ITO, Gwalior, who was in charge of the assessment was requested by the assessee to transfer his case to the ITO, Calcutta. However, on inquiry the ITO, Gwalior, did not find that there was any assessment case pending with the ITO, Calcutta, and the ITO. Gwalior, therefore, fixed the case for hearing on March 21, 1955, and sent a telegram to the assessee communicating the date. On this, the assessee informed the ITO, Gwalior, that his

file had been transferred to the ITO, Delhi. The ITO, Gwalior, made inquiries with the ITO, Delhi, who requested him to complete the assessments, which were getting barred by time, and then to consider the question of transferring the files of the assessee to Delhi in April of 1955. The ITO, Gwalior, then completed the assessment of the assessee on March 31, 1955, and also issued notice under s. 28(3) for the assessee''s failure to company with the notices under ss. 22(4) and 23(2) of the Act.

2. The assessee''s quantum appeal came to be decided by the AAC on July 30, 1960. In the meantime, the case of the assessee had been transferred to Delhi in April, 1958. From there the case was subsequently transferred to Bombay and it was the ITO at Bombay who noticed that penalty proceedings were still pending against the assessee. When the ITO took up the penalty proceedings, two objections were taken before him. One was that the assessment order dated March 31, 1955, was in the name of M/s. Agarwal and Co. (proprietor, Shri Lalta Prasad Goenka, Naya Bazar, Laskar) while the penalty order was made in the name of Lalta Prasad Goenka. The other objection was that the notice under s. 28 (3) was issued as far back as on March 31, 1955, and in view of the decision of the Allahabad High Court in MOHD. ATIQ Vs. Income Tax OFFICER, DISTRICT II (V), KANPUR., , the proceedings must be held to be barred by time. Both these contentions were negatived by the ITO who found that the maximum penalty under s. 28(1)(b) worked out to Rs. 62,644. He, however, imposed a penalty of Rs. 25,000 only.

3. In appeal the same contentions were raised by the assessee and were rejected by the AAC. The assessee took the matter in appeal to the Tribunal where also the same contentions were agitated. The Tribunal confirmed the decision of the AAC. The Tribunal held that the penalty order was not defective and that the explanation which was sought to be given by the assessee at that stage that the assessee was under a genuine mistake for not complying with the notices under ss. 22(4) and 23(2) was not justified. The order of the Tribunal, however, does not disclose as to what was the mistake which was canvassed before the Tribunal. The Tribunal had, however, referred to the conduct of the assessee and found that his conduct showed that there was a deliberate attempt not to comply with the notices under ss. 22(4) and 23(2) of the Act. From his order of the Tribunal, at the instance of the assessee, the following question has been referred to this court for opinion :

"Whether, on the facts and in the circumstances of the case, any penalty was leviable against the assessee u/s 28(1)(b) of the Indian Income Tax 1922 ?"

4. The first contention raised on behalf of the assessee by Mr. Dwarkadas is with regard to the validity of the order of penalty. It is contended that the assessment is made in the name of M/s. Agarwal & Co., the notice under s. 28(3) was also issued in the name of M/s. Agarwal & Co., while the order of penalty is made in the name of Lalta Prasad Goenka, proprietor, M/s. Agarwal & Co. It is difficult for us to entertain such a submission because there is no difference so far as the assessee is concerned, as he is named in the order of assessment and in the order of penalty

the assessee who has been assessed to tax is Lalta Prasad Goenka, who is the proprietor of M/s. Agarwal & Co. The penalty order is also against the same person. Merely because in the assessment order the trade name of Lalta Prasad Goenka is given, the trade name does not become the assessee and in fact the assessee was only Lalta Prasad Goenka.

5. The second contention raised is that the proceedings have been delayed. Now, it is obvious that there is no provision anywhere in the Indian I.T. Act, 1922, which prescribes any limitation for limitation for completing the penalty proceedings. In the case of MOHD. ATIQ Vs. Income Tax OFFICER, DISTRICT II (V), KANPUR., , on which the assessee has relied, it was held that no period of limitation has been prescribed for imposing penalty; proceedings for levy of penalty, but the proceedings must be taken after the expiry of about 14 years, and it was held appears from the facts of that case that the learned judge in that case was concerned with a grievance that the proceedings were commenced after a long time and the decision was given in the writ jurisdiction when the assessee had approached the High Court for quashing the notices on the ground of delay. The facts show that two days after the assessment was completed, on January 29, 1945, notice under s. 28 (1)(b) was issued to the firm proposing to impose a penalty and the petitioner in that case was a partner of that firm. The assessment was an ex parte assessment. Application under s. 27 for setting aside the ex parte assessment was rejected and the appeal was also dismissed on May 7, 1946. The firm itself was dissolved in June, 1945. The last assessment of the firm was made for the assessment year 1946-47 and was completed on the September 12, 1950. The court had found that from January 29, 1945, to September 12, 1950, nothing was done in respect of the notice under s. 28(1)(b) until the completion of the last assessment of the firm on September 12, 1950. Thereafter, again nothing was done till May 25, 1957, when a notice was issued in the name of the firm that penalty proceedings against it initiated by the notice dated January 29, 1945, were still pending. The last of the notice issued to the firm was date August 1, 1958, and it was in this notice dated August 18, 1958, that the name of the petitioner was mentioned in addition to the name of the firm. The petitioner apprehending that the penalty order would be passes against him without considering his written reply, which was filed by him on December 4, 1958, approached the High Court for the issue of a writ of prohibition, restraining the ITO from proceedings further in the matter of imposing penalty. This petition was withdrawn by the petitioner but after the withdrawal of the petition, an order of penalty was served on him on January 17, 1959. The petitioner then filed a second petition which was disposed of by the learned judge in which certain observations in regard to the delay have been made. The decision shows that the learned judge took the view that the proceedings should be taken within a reasonable time and that a period of 14 years could not be said to be unreasonable. The decision cannot, in our view, be said to lay down any general proposition that every delayed order of penalty must become invalid merely on the ground of delay.

The question of delay had not been raised before the Tribunal. The decision of MOHD. ATIQ Vs. Income Tax OFFICER, DISTRICT II (V), KANPUR., was considered by a Division Bench of the same court in Ram Kishan Baldeo Prasad Vs. The Commissioner of Income Tax, . Before the Division Bench, the decision of MOHD. ATIQ Vs. Income Tax OFFICER, DISTRICT II (V), KANPUR., was relied upon by the assessee for the proposition that though no period of limitation was prescribed for the imposition of a penalty, the proceedings must be taken within a reasonable time and be quashed. Dealing with this argument, the Division Bench observed as follows (p. 494) :

"If the learned single judge intended to lay down that inordinate delay in every case, as a matter of law, would lead to the invalidity of the penalty order then we cannot, with respect, subscribe to it."

6. The Division Bench further pointed our that where the assessee is not to blame for the inordinate delay in completing penalty proceedings and the sword of Democles has been kept hanging over his head for many a year without any rhyme or reason, it will certainly be a factor, amongst others, for the Tribunal to consider whether the order passes by the ITO was a proper one. It is clear, therefore, that even the Division Bench of the Allahabad High Court was not inclined to read the decision in MOHD. ATIQ Vs. Income Tax OFFICER, DISTRICT II (V), KANPUR., as laying down a proposition that a delay invalidates an order of penalty.

7. The Orissa High Court has also taken a similar view that since the Indian I.T. Act of 1922 does not contain any provision prescribing the period within which an order of penalty should be made, no such order can be held to be bad in law merely because of inordinate delay (See COMMISSIONER OF Income Tax, BIHAR AND ORISSA Vs. RUPSA RICE MILL.,

8. The facts in the instant case, to which we have adverted earlier, indicate the circumstances under which the delay has occurred. The case of the petitioner was being transferred from place to place. Till July 30, 1960, the penalty proceedings were stayed at the instance of the assessee pending the decision of the quantum appeal. Then the case was transferred to Delhi in April, 1958. The papers then came to be transferred to Bombay and thereafter these proceedings were taken. In our view, since to limitation has been prescribed in the Indian I.T. Act, 1922, for completion of the penalty proceedings in will not be possible to hold that the order of penalty becomes vulnerable merely on the ground of delay. These are the only two points raised before us.

9. The non-compliance with the notices under ss. 22(4) and 23 (2) of the Act is an admitted position and we do not filed any error in the order of the Tribunal dismissing the appeal filed by the assessee. The question referred to us must be answered in the affirmative and in favour of the revenue.

10. The assessee to pay the costs of the reference.