Commissioner of Income Tax, Poona Vs New Sind Weaving Factory

Court: Bombay High Court

Date of Decision: Sept. 15, 1983

Acts Referred: Income Tax Act, 1961 â€" Section 139(1), 271(1), 274

Citation: (1984) 38 CTR 208 : (1984) 150 ITR 671 : (1983) 15 TAXMAN 551

Hon'ble Judges: S.P. Bharucha, J; S.K. Desai, J

Bench: Division Bench

Judgement

Desai, J.
Today there is no appearance of the respondent, either in person of through an advocate. However, it may be stated that on

September 2, 1983, one Gurdinomal Jumrani, a partner of the respondent firm, had appeared and had handed over the written submission. He had

then stated that the court may consider them at the time of hearing. These submissions are before us and we have duly considered them.

2. The assessee-firm submitted its return for the year 1962-63 on August 1, 1964.

3. The ITO was of the view that the return ought to have been filed on or before June 30, 1962. Accordingly, in his opinion, penalty was leviable

under s. 271(1)(a) of the I.T. Act, and, hence, he issued notice against the respondent under s. 274 of the Act. The assessee made its submissions

but the ITO was not satisfied with the same and he imposed a penalty of Rs. 10,250.

4. The assessee-firm thereupon preferred an appeal before the AAC. Various contentions were urged before the AAC. These are summarised in

para. 2 of the statement of the case. The AAC rejected all the contentions save and except a fairly minor one pertaining to tax of Rs. 1,642.48

paid by the assessee-firm on a provisional assessment. By the order of the AAC, the ITO was directed to give credit for the tax of Rs. 1,642.48

while computing the penalty at 2% (per month) on the advance tax payable by the assessee.

5. The assessee preferred an appeal to the Income Tax Appellate Tribunal and the Revenue also preferred cross-objections. By its decision in the

appeal and on the cross-objections, the Tribunal allowed the appeal on a limited footing. In its view, the submission made by the assessee that

there was on delay in the submission of the return and there occurred on default which could be penalised was required to be accepted in view of

the Supreme Court decision in Commissioner of Income Tax, Punjab Vs. Kulu Valley Transport Co. P. Ltd., . The Tribunal, however,, rejected all

other contentions which had been advanced on behalf of the assessee. It also rejected the cross-objections filed by the Revenue placing reliance

on M.M. Annaiah Vs. Commissioner of Income Tax, Mysore, and Commissioner of Income Tax Vs. Vegetable Products Ltd., The discussion of

the Tribunal is to be found contained in para. 10 of its appellate order.

6. At the instance of the Commissioner and presumably at the instance of the assessee (as the statement is not precisely drafted), the following

seven questions have been referred to us :

1. Whether, on the facts and in the circumstances of the case, the assessee failed to comply with the provisions of section 139(1) of the Income

Tax Act, 1961, and rendered itself liable to penalty ?

2. Whether, on the facts and in the circumstances of the case, the period for filing the return could be deemed to have been extended as the

Income Tax Officer levied interest for the period of the delay in the submission of the return ?

3. Whether, on the facts and in the circumstances of the case, the delay in the submission of the return could be deemed to have been condoned as

the Income Tax Officer levied interest for the period of the delay in the submission of the return ?

4. Whether, on the facts and in the circumstances of the case, the order of penalty was liable to be set aside on the ground that the penalty

proceedings were not initiated in conformity with the requirements of law on the point ?

5. Whether, on the facts and in the circumstance of the case, the amount of advance tax paid by the partners of the assessee-firm in their individual

cases was liable to be taken into account in computing the amount of penalty imposable in the case ?

6. Whether the 2% rate of penalty is the maximum amount of penalty imposable in the case or is the uniform rate of penalty which leases on

discretion in imposing the penalty ?

7. Whether the tax of Rs. 1,642.48 paid by the assessee as per the provisional assessment was liable to be taken into account in computing the

amount of penalty ?

7. It would appear that the answers to be given to questions Nos. 1 to 4 are settled by decisions given by Benches of this court in which judgments

of other High Courts and the statutory provisions and answer the four questions.

8. The first of these two decisions of this High Court is the decision in Commissioner of Income Tax, Poona Vs. R.S. Deshpande, . The second

decision of the High Court is Commissioner of Income Tax, Pune Vs. Abdul Hamid Shah Mohamed, . In the latter case, it has been held

concurring with the observations of the Delhi High Court that the decision of the Supreme Court in Commissioner of Income Tax, Punjab Vs. Kulu

Valley Transport Co. P. Ltd., , could not be extended to the context of the provisions contained in s. 271(1)(a) of the I.T. Act, 1961.

9. The present reference as far as these four question are concerned does not call for any further or elaborate discussion. Accordingly, we answer

questions Nos. 1 to 4 as under :

No. 1 : In the affirmative and in favour of the Revenue.

No. 2 : In the negative and against the assessee.

No. 3 : In negative and against the assessee.

No. 4 : We are of the opinion that the order penalty was not liable to be set aside on the ground indicated in the question.

10. As far as question No. 5 is concerned, the position is self-evident and the argument advanced on behalf of the assessee seems to have been

rightly rejected both by the AAC and by the Tribunal. It is not possible to consider the advance tax paid by the partners as advance tax payable by

the firm.

11. Similarly, as far as question No. 6 is concerned, the language of the statutory provisions it stood at the relevant time and which provision was

applicable for the assessment year in question would clearly suggest that there was no discretion and a flat rate of penalty to be calculated per

month of the period of default was prescribed by the legislature leaving no discretion to the taxing authority to levy a smaller amount. Accordingly,

question No.6 is answered as under :

12. No. 6 : At the relevant period at 2% (per month) rate of penalty was the uniform rate of penalty leaving no discretion in fixing the quantum of

penalty.

13. As far as question No. 7 is concerned, it would appear that the two decisions referred to by the Tribunal were subsequently approved by the

Supreme Court in The Commissioner of Income Tax, West Bengal 1, Calcutta Vs. Vegetables Products Ltd., . However, cl.(1) of s. 271 was

subsequently substituted by Parliament by enacting the Direct Taxes (Amendment) Act, 1974, with retrospective effect from the commencement of

the Act, i.e. April 1, 1962. The effect of the amendment was to substitute ""assessed tax"" for ""tax"" and to insert an Explanation. The Explanation

provided for the meaning to be given to the phrase ""assessed tax"" and by the said Explanation ""assessed tax"" meant ""tax"" as reduced by the sum

deducted at source under Chapter XVII(b) or paid in advance under Chapter XVII(c). This was clearly done to negative the decisions of the

court, which had also allowed deductions of the amounts paid as tax on provisional assessment. In view of the clear provisions in the Explanation,

only the sums deducted at source and advance tax paid by the assessee-firm was deductible at the time when penalty was required to be

calculated. If that be so, question No. 7, would be required to be answered in favour of the Revenue. Accordingly, we hold as far as this question

is concerned that both the AAC and the Tribunal had erred in allowing credit for the tax of Rs. 1,642.48 which had been paid on provisional

assessment. We may add that this view was the correct one on the language of the provision as it then stood and as interpreted by the court.

However, in view of the subsequent retrospective amendment, the view must be declared to be erroneous. The Commissioner to get the costs of

the reference from the assessee.