(1981) 11 BOM CK 0033

Bombay High Court

Case No: Appeal No. 254 of 1976 in Miscellaneous Petition No. 745 of 1969

D. Swarup, Income Tax Officer, Companies Circle, Bombay		APPELLANT
	Vs	
Gammon India Ltd.		RESPONDENT

Date of Decision: Nov. 13, 1981

Acts Referred:

- Income Tax Act, 1961 - Section 143, 144, 147, 148, 2(40)

Citation: (1982) 28 CTR 264 : (1983) 141 ITR 841 : (1982) 10 TAXMAN 159

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

Bench: Division Bench

Judgement

Chandurkar, J.

This is an appeal by the ITO, Companies Circle, Bombay, against the order of the learned single judge quashing the notice of penalty issued on July 4, 1969, by the ITO to the respondent company under s. 273 of the I.T. Act, 1961. Since pure questions of law arise in this appeal, it is not necessary to refer in detail to the assessment proceedings for the assessment year 1959-60 out of which the penalty proceedings had arisen.

2. Originally for the assessment year 1959-60 the income of the assessee company was determined at Rs. 20,53,407 by an assessment order, dated April 16, 1963. Earlier, notice under s. 18A of the Indian I.T. Act. 1922, was issued to the assessee in May, 1959, demanding advance tax of Rs. 8,65,592 to which the assessee in May, 1959, demanding advance tax of Rs. 8,65,592 to which the assessee had objected, as according to the assess the correct amount of the advance tax payable was Rs. 3,23,732. Notice under s. 274 of the I.T. Act, 1961, came to be issued to the assessee to show cause why penalty should not be imposed for under-estimating the profits while paying advance tax and a penalty of Rs. 81,000 was levied against the assessee by the ITO in respect of the assessment year 1959-60. The levy of this penalty came to be challenged by the assessee before the Income Tax Tribunal and though on the

facts the Tribunal took the view that the assessee had filed an estimate which he knew or had reason to believe to be untrue and the penalty would have ordinarily been attracted, the order of penalty was set aside on the technical ground that the proceedings taken under the new Act could not be sustained. The Revenue had brought the matter to this court by way of a reference under s. 256 of the Act. The reference was pending when the order under appeal was passed by the learned single judge. But it is now common ground that the validity of the penalty proceedings has been upheld by this court in favour of the Revenue and the order of penalty of Rs. 81,000 was sustained.

3. Now, after the order of the Tribunal was passed June 7, 1967, a notice under s. 147 of the I.T. Act, 1961, was issued to the assessee and the assessment of the assessee for the assessment year 1959-60 was reopened. On assessment, the income of the assessee was determined at Rs. 26,93,032 by an order dated July 4, 1969, and on the same date the ITO issued a notice of penalty under s. 273 of the Act on the footing that the assessee had "furnished under sub-section (2)/(3) of section 18A of the Indian Income Tax Act, 1922, or u/s 212 of the Income Tax Act, 1961, estimate (s) of advance tax payable by him for the assessment year 1959-60 which he knew or had reason to believe to be nature. It was this notice which was challenged in a writ petition filed in this court.

4. One of the grounds, which alone is material for the disposal of this appeal, on which the notice we challenged, was that no action for levy of penalty under s. 273 could be taken against the assessee on the basis of the penalty under s. 273 could be taken against the assessee on the basis of the order passed in reassessment under s. 147 of the Act because the power under s. 273 of the Act can be exercised only if ITO "in the course of any proceedings in connection with the regular assessment for any assessment year is satisfied that any assessee has furnished a statement of the advance tax payable by him which he knew or had reason to believe to be untrue". The argument before the learned single judge was that when s. 273 refers to "regular assessment", those words must be construed with reference to the meaning given to those words in s. 2(40) of the Act, as to mean "assessment made u/s 143 or section 144". This contention has been accepted by the learned single judge and the notice of penalty was quashed as being without jurisdiction.

5. In this appeal, Mr. Joshi appearing on behalf of the appellant, has placed reliance on the decision of this court in Deviprasad Kejriwal Vs. Commissioner of Income Tax (Central), Bombay, which was a decision dealing with penalty under s. 18A(9) of the Indian I.T. Act, 1922, in which a Division Bench of this court has held that penalty can be levied on the assessee for having furnished estimates of the payable by him which he knew or had reason to believe to be untrue even after reassessment proceedings under s. 34 (1) of the Indian I.T. Act, 1922 and that "regular assessment" referred to in s. 18A(9) if the 1922 Act. The learned counsel for the

Revenue contended that notwithstanding the definition of "regular assessment" in s. 2(40) of the 1961 Act, in the context of s. 273 of the Act, those words must also be held to include the reassessment proceedings. Reliance was also placed on the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section (139(2))". The argument, therefore, was that after the assessment proceedings were reopened by notice under s. 147, the reassessment must be treated as assessment made under s. 143 and, consequently, the reassessment is also a "regular assessment" within the meaning of those words used in s. 273 of the Act.

6. Apart from the fact that the Kerala, Patna, Punjab and Haryana, Allahabad and Orissa High Courts have taken the view that the words "regular assessment" in 273 of the Act do not include a reassessment under s. 147 of the Act and that meaning of those words in s. 273 must be the same as given in the definition of regular assessment, it appears to us that even otherwise on pure principles of construction, the argument advanced on behalf of the Revenue cannot be accepted. Section 2(40) defines "regular assessment" as follows :

""'Regular assessment'' means the assessment made u/s 143 or section 144."

7. The opening words of s. 273 read as follows :

"If the Income Tax Officer, in the course of any proceedings in connection with the regular assessment for any assessment year, is satisfied that any assessee-...

he may direct that such person shall, in addition to the amount of tax, if any, payable by him, pay by way of penalty a sum-...

8. Now, under s. 147 the ITO is empowered in case referred to therein to "assess or reassess" the income for the assessment year concerned. But before he proceeds to reassess the income which has escaped assessment, s. 148 required him to issue a notice to the assessee. Section 148 reads as follows :

"(1) Before making the assessment, reassessment or recomputation u/s 147, the Income Tax Officer shall serve on the assessee a notice containing all or any of the requirements which may be included in a notice under sub-section 139; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section...."

9. A reference to ss. 147 and 148 will clearly show that s. 147 contains independent power of assessment or reassessment. In the present case, we are concerned with reassessment. Section 148 expressly refers to the making of the assessment, reassessment or recomputation under s. 147, There is, therefore, a clear indication in the Act itself that the reassessment under s. 147 is not the same as assessment under s. 143 or s. 144. A simple grammatical construction of these two provisions would also show that the assessments under ss. 143 and 144 are not the same as the one under s. 147 of the Act. When s. 148 refers to the fact that the provisions of

the Act Shall, so far as may be, apply to the reassessment under s. 147 the effect would be only that the machinery, which is earlier prescribed can be resorted to for the purpose of making reassessment under s. 147 of the Act. The mere fact that the machinery which is availed of for the purpose of assessment under s. 143 or s. 144 of the Act can be availed while making reassessment under s. 147 does not make the reassessment under s. 147 the same as an assessment under s. 143 or s. 144.

10. Apart from this intrinsic evidence in ss. 147 and 148 which indicates that to reassessment under s. 147 is separate and distinct from the assessment under s. 143 or s. 144, there are other provision of the Act which clearly highlight this difference. Section 153 contains provisions for a time-limit for the completion of assessments and reassessments. The provisions of that section will show that in sub-s. (1), the time-limit prescribed is for assessment under s. 143 or s. 144, while under sub-s. (2), the time-limit is specifically prescribed for assessment, reassessment or recomputation under s. 147. Similarly, the provisions regarding appeals contained in cls. (c) and (e) respectively of s. 246(1) of the Act will show that Parliament thought it fit to make independent provisions of appeal against an "order of assessment under sub-section (3) of section 143 or 144 "and against" an order of assessment, reassessment or recomputation u/s 147 or 150".

11. By way of illustration, one more provision may be referred to, that provision is contained in s. 263 of the Act, which deals with the revisional jurisdiction of the Commissioner. Sub-section (2) of section 263 specifically provides that "no order shall be made under sub-section (1)(a) to revise an order of reassessment made u/s 147". The illustrations pointed out by Mr. Dastur highlight the fact that a "regular assessment" under ss. 143 and 144 and reassessment under s. 147 have been separately health with in the different provisions of the Act. Therefore, having regard to the terminology used in s. 273, it will be difficult to hold that the words "regular assessment" in s. 273 should also take in reassessment made under s. 147.

12. The words "regular assessment" which were to be found in sub-s. (9) of s. 18A of the I.T. Act, 1922, have, no doubt, been construed by a Division Bench of this court in Deviprasad Kejriwal Vs. Commissioner of Income Tax (Central), Bombay, , cited superior, to cover cases of reassessment under s. 34(1). That decision cannot, however, be of any assistance now for construing s. 273. The distinguishing feature which would be enough to hold that the provisions in s. 273 of the 1961 Act should not be construed in the same manner as s. 18A(9) of the 1922 Act, which was construed in Deviprasad''s case, is that the words "regular assessment" have now been specifically defined by the legislature. The 1922 Act did not define the words "regular assessment". In view of the definition of these words in s. 2(40) of the Act, under the accepted canons of construction wherever those words are used, the meaning given in the definition clause must be substituted. This has also to be considered in the light of the fact that at several places the assessment under s. 143 or 144 has been used in contradistinction with reassessment under s. 147. We also

do not find anything in the context of s. 273 which would require the words "regular assessment" to be given a meaning different from the one given by the Legislature when these words were defined.

13. We need not refer in detail to the decisions of several High Courts which have taken this view. It would be enough if we merely mention those decisions. The decisions which have taken the same view which we have taken are : (1) Gates Foam and Rubber Co. Vs. Commissioner of Income Tax, Commissioner of Income Tax Vs. Ram Chandra Singh, SMT. KAMLA VATI Vs. COMMISSIONER OF Income Tax (CENTRAL), PATIALA., Commissioner of Income Tax Vs. Smt. Jagjit Kaur, and (5) Commissioner of Income Tax Vs. Ganeshram Nayak,

14. The additional argument which was advanced by Mr. Dastur was that the notice of penalty, dated July which was already levied has been sustained by this court and there could not be two orders of penalty in respect of the same default or omission. In the view which we have taken on the validity of the notice of penalty itself, we do not thing it necessary to go into the merits of tis contention.

15. The appeal must, there, stand dismissed. The respondent will be entitled to the costs of this appeal.