Cit Vs. Md. Ehtesam

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Court : Patna

Decided On : Apr-13-2004

Appeal No. : Tax Case Nos. 27 To 36 of 1989 13 April 2004

Appellant : Cit

Respondent : Md. Ehtesam

Prior history : Nagendra Rai, J. The point involved in all the cases under reference being the same, they have been heard together and are being disposed of accordingly. 2. This is reference under section 256(2) of the Income Tax Act, 1961 (hereinafter referred to as the Act) made by the Income Tax Appellate Tribunal, Patna Bench, Patna to answer the following question of the law. 'Whether on the facts and in the circumstances of the case, the Tribunal was justified in confirming the order passed by the Appe

Judgement :

Nagendra Rai, J.

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2. This is reference under section 256(2) of the Income Tax Act, 1961 (hereinafter referred to as the Act) made by the Income Tax Appellate Tribunal, Patna Bench, Patna to answer the following question of the law.

'Whether on the facts and in the circumstances of the case, the Tribunal was justified in confirming the order passed by the Appellate Assistant Commissioner holding that as the penalty was imposed on the firm for delay in filing the return, no penalty was leviable on the assessee, who was a partner of the firm under section 271(1)(a) of the Income Tax Act, 196l.'

3. In all the ten cases, the same question has been referred and in five reference cases, namely, Tax Case Nos. 27,28,29,30 and 33 of 1989, the opposite party is Md. Ehtesam and in other five Tax Case Nos. 31,32,34,35 & 36 the opposite party is Md. Ezaz.

4. The matter relates to imposition of penalty for not filing the return within time for the assessment years 1973-74, 1974-75, 1975-76, 1976-77 and 1977-78. The matter also relates to the assessment years 1972-73 as well as 1978-79. However, the matter with regard those years is not the subject matter of decision in this case for the reason that the penalty imposed for not filing the return with regard to aforesaid two years has attained finality by the order of the appellate authority and that was not challenged by the assessees /opposite parties.

5. Both the aforesaid persons were partners of a firm known as 'M/s. Quality' situated at Sabjibagh, Patna. Each of the partners have 50 per cent share in the business of the firm. It is admitted position that their only source of income is the share from the income of the firm.

6. A search was conducted on the business and residential premises of the said firm and partners and documents were seized under section 132 of the Act. On verification of the documents incriminating materials were found. The firm was assessed under section 144 of the Act and penalty was also imposed under section 274(1)(a) of the Act.

7. Both the partners were also issued under section 148 of the Act. Neither they filed return of income nor did they apply for extension of time to file the return. Though one of the partners Md. Ezaz was given opportunity to take extracts of the seized papers, even then they did not file the return. Thereafter, the assessment proceedings were initiated against both the partners/opposite parties. Notice of

show cause was issued under section 274 of the Act by the Income Tax Officer as to why penalty be not imposed as there was no reasonable cause for not filing the return within time. Both the partners appeared and filed their show cause and took three pleas for not leaving the penalty. The said pleas are as follows:

'(i) the only source of income is share income from the firm. Since the firm did not file any return, he could not know his share income.

(ii) the assessment of the firm was made as URF and his share income had been taken which was exempted under section 86(iii); and

(iii) the proceeding under section 147(a) initiated was, in fact, ab initio without jurisdiction. particularly because petition under section 273A and under section 245C filed are pending.'

8. The assessment proceedings concluded and best judgment assessment was made under section 144 of the Act. In the penalty proceeding, the concerned Income Tax Officer did not accept the explanation given in the show cause and imposed penalty under section 271(1)(a) of the Act for all the assessment years as referred to above by separate orders dated 5-2-1982. Both the assessees/partners/opposite parties filed appeals and the appeals filed by each of them were heard together and were disposed of by two separate orders dated 11-10-1984. The appellate authority reduced the amount of penalty for the assessment year 1972-73 and with regard to assessment year 1978-79, the appellate authority found that as the date for filing the return was 3 1-7-1978 and both the assessees/ partners/opposite parties filed the return on 23-4-1980 and there was no reasonable cause for not filing the return and accordingly upheld the order of penalty imposed by the Income Tax Officer.

9. So far as the penalty imposed for other assessment years, the appellate authority held the firm is not a legal person or juridical entity and any tax imposed on a firm is, in fact, a tax upon the partners and similarly penalty on the firm is a penalty on the partners and once the penalty has been imposed on the firm under section 271(1)(a) of the Act, the penalty cannot be levied again upon the partners and as in the case in hand, the penalty has already been imposed on the firm by

the Income Tax Officer, the penalty was not leviable upon the partners for the assessment years 1973-74 to 1977-78 and, accordingly, cancelled the penalty.

10. The department filed an appeal before the Income Tax Appellate Tribunal, Patna against the orders passed by the appellate authority and the Tribunal concurred with the opinion of the appellate authority and held that we agree with the orders passed by the appellate authority that the penalty orders in the cases against the assessees/opposite parties were not justified.

11. The Tribunal did not refer the matter to this court at the instance of the department and thereafter an application was filed before this court for a direction to the Tribunal to refer the aforesaid question of law and this court by order dated 17-7-1990 directed the Tribunal to refer the aforesaid question and thereafter the question has been referred to for decision.

12. So far factual matrix are concerned, the admitted fact is that the partners/assessees /opposite parties only source of income is share of the firm. It is also admitted position that the firm did not file the return and after discovery of the incriminating materials in pursuance of the search and seizure, the firm has been assessed and penalty has been imposed and thereafter penalty has also been imposed on the assessees /partners/ opposite parties for not filing the return in time and not showing the reasonable cause for failure to file the returns within time.

13. Learned counsel appearing for the department submitted that the firm and the partners are two distinct entities and penalty can be imposed for not filing the return in accordance with the provisions of section 271(1)(a) of the Act on the firm as well as on the partners and the partners cannot escape from the liability to pay the penalty only on the ground that the penalty has already been imposed and paid by the firm. In support of his submission, he relied upon the decisions of the Madhya Pradesh High Court in the case of Amritlal Somabhai v. CIT : [1979]116ITR833(MP) and in the case of Ramlal Agarwal v. CIT : [1982]134ITR342(MP) .

14. Learned counsel appearing for the partners/assessees/opposite parties submitted that the firm is not a legal entity or is not a legal person even though it has some attributes of personality. It is, in fact, collection of separate persons and as such the imposition of penalty on the firm is, in substance, imposition on the partners and once the penalty which is the nature of additional tax has been imposed on the firm, which in substance, is penalty on the partners, the partners, cannot again be penalised under section 271(1)(a) of the Act. He also submitted that even if it is treated that the firm and partners are different entities and penalty can be imposed against both under section 271(1)(a) of the Act, in view of the admitted fact that the only source of income of the partners being the income from the firm and as the firm has not filed the return, the partners were not in know of the share of the income and as such they also did not file the return and therefore, there was reasonable cause for not filing the return within time and the appellate authority rightly cancelled the penalty order passed by the Income Tax Officer. In support of his submission, he relied upon the decisions (Venkateswara Power Rolling Mills v. CIT : [1974]97ITR168(KAR) , Addl CIT v. Smt. Triveni Devi : [1974]97ITR390(All) , CIT v. Pratap Chand Maheshwari , CIT v. Baijnath Chopolia : [1976]102ITR551(Orissa) , Madan Lamba v. CIT : [1983]139ITR849(Delhi) and CIT v. R. Sridhar (2003) 143 ITR 586.

15. The Madhya Pradesh High Court in the cases of Amritlal Somabhai (supra) and Ramlal Agrawal (supra) has held that the firm and partners are two distinct entities for the purpose of income-tax and firm and partners can both be penalised for late filing of return under section 271(1)(a) of the Act.

16. The contrary view has been taken by the Allahabad High Court in the case of Smt. Triveni Devi (supra) wherein it has been held that a firm, though it is an assessable for the purpose of income-tax as a separate unit, it is not a legal person or judicial entity and any imposition of tax is, in fact, a tax upon the partners. In view of the judgment of the Supreme Court in the case of Dulichand Laxminarayan v. CIT : [1956]29ITR535(SC) , a penalty is nothing but an additional tax and as such the principle contained in section 86(iii) of the Act would apply as much to penalty as to tax. Once the penalty has been levied for concealment of income of the firm, penalty cannot be imposed with regard to concealment of the

income in the hands of the partner. In this connection it is useful to refer the relevant paragraph of the said judgment.

'Now, a firm, even though it is an assessable unit for purposes of the income-tax, is not a legal person or a juridical entity- see Dulichand Laxminarayan v. CIT (supra). Thus, any tax imposed upon a firm is in fact a tax upon the partners. That is why a provision has been made in clause (iii) of section 86 that tax is not payable by a person who is a partner of and unregistered firm in respect of a portion of the income of the firm upon which tax is payable by the firm. This provision has been enacted to avoid double taxation of the same income in the hands of the same person. There is no such provision with regard to penalty. But obviously the same principle would apply in the case of penalty also. If it is not permissible to levy tax twice over in the hands of the same person in respect of a particular income penalty which is leviable with reference to that income can also not be levied twice over once in the hands of the firm and again in the hands of its partners. In fact, as pointed out by the Supreme Court in C.A Abraham v. ITO (1961) 4 ITR 425, ' a penalty is nothing but an additional tax and the principle contained in clause (iii) of section 86 would apply as much to penalty as to tax. Even if penalty is regarded as punishment, a person cannot be punished more than once in respect of the same offence. As already pointed out above, penalty levied upon an unregistered firm is in fact a penalty imposed upon the partners so that the imposition of penalty in respect of the same income in the hands of the partners would amount to double punishment. No provision has been brought to our notice under which such a course can be adopted.' (p. 392)

17. The Punjab and Haryana High Court also considered the said question in the case of Pratap Chand Maheshwari (supra) and followed the judgment rendered by the Allahabad High Court in the case of Smt. Triveni Devi (supra) and distinguished the decision of Madhya Pradesh High Court in Amritlal Somabhais case (supra) on the ground that the question of double penalty was not considered at all in the case of Amritlal Somabhai (supra) by the Madhya Pradesh High Court. Thus, the Punjab and Haryana High Court also held that once the penalty has been imposed upon the firm under section 271(1)(a), penalty cannot be imposed again on the partners as the penalty imposed on the firm is, in fact, a penalty

imposed on the partners.

18. The settled law is that the firm is not a legal entity even though it has some attributes of personality. In other words, it is a collection of separate persons. (See CIT v. R.M. Chidambaram Pillai : [1977]10ITR292(SC)). It is also settled law that the penalty is an additional tax and in a case where the only source of partner is income of the firm and the firm has been imposed penalty for not filing the return in time under section 271(1)(a) of the Act, then that will amount to imposing a penalty on the partners and the partners again cannot be penalised under section 271(1)(a) of the Act for not filing the return within reasonable time. Thus, we are in agreement with the view taken by the Allahabad High Court and the Punjab and Haryana High Court. So far the law laid down by the Madhya Pradesh High Court in the cases of Amritlal Somabhai (supra) and RamIal Agrawal (supra) is concerned, there the question of double penalty was not considered at all.

19. Even if it is assumed that the penalty can be imposed on the partners under section 278 of the Act even if the firm has been penalised under the aforesaid provision, the assessing authority may not impose the penalty in case it is found that there is reasonable cause for not filing the return within time. The question as to what would be reasonable cause in a particular case cannot be put in a straight jacket formula which depends upon the facts and circumstances of the case. Once sufficient cause is shown for not filing the return within time, penalty cannot be imposed. This view finds support from the decisions rendered in the cases of Venkateswara Power Rolling Mills (supra) Baijnath Chopolia (supra), Madan Lamba (supra) and R. Sridhar (supra).

20. The appellate authority has cancelled the order of penalty on both grounds, namely, that there cannot be double penalty in the case of firm where the partners have only the source of income from the firm and also there is reasonable cause shown by the assessee for not imposing the penalty. The Tribunal has concurred with the same.

21. Thus, the question under reference is answered in favour of the assessees/partners/opposite parties and against the department.

22. All the tax cases are disposed of accordingly. The parties will bear their own cost.