

Gangeshwar Ltd. Vs. Ispecting Assistant

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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Oct-08-1986

Reported in : (1986)19ITD827(Delhi)

Judge : G Krishnamurthy, M Agarwal

Appellant : Gangeshwar Ltd.

Respondent : inspecting Assistant

Judgement :

1. This is an assessee's second appeal against the levy of a penalty of Rs. 9,00,598 for a default under Section 271(1)(a) of the Income-tax Act, 1961 ('the Act') in filing the return of income for the assessment year 1978-79.
2. We have heard the learned counsel for the assessee and the learned departmental representative and have perused the material placed before us.
3. The return of the assessee for the assessment year 1978-79 was due to be filed on 30-6-1978. It was, however, filed by the assessee on 1-7-1980, i.e., after a delay of 24 months. The assessee had sought extension of time for filing the return vide applications dated 26-6-1978 and 30-8-1978. In the first application it was stated that 'audit of accounts for the accounting year relevant to the above assessment is under finalisation and as such assessable income cannot be determined at this stage'. By this application extension of time up to 30-8-1978 was sought. By the second application moved on 30-8-1978 extension was sought

up to 31-10-1978 for the reason 'the dealing hand Shri K.L. Bhasin has resigned and we are handicapped for making of return of income of the above-mentioned assessment year'. There is no dispute that the extensions sought by the assessee were allowed by the ITO and that is why he has levied the impugned penalty only for a default of 20 months.

4. The ITO initiated proceedings for the levy of penalty under Section 271 (1)(a). The assessee-company stated that the accounts of the company were not finalised and audited in time and the man handling the accounts of the company left the services of the company on 29-8-1978 and the company could not get a proper replacement. According to the assessee, it was for these reasons that the return of income got delayed. The learned ITO rejected this explanation observing that the assessee did not even care to apply for extension beyond 31-10-1978 ; the assessee-company had vast resources and was assisted by several accountants including chartered accountants ; the ground that a particular person left the services is not enough to explain the delay of 20 months ; the assessee's accounts were to be closed on 30-6-1977 and the assistant accountant Shri Bhasin left the services more than a year later. The ITO, therefore, felt satisfied that the delay was deliberate and in any case it was without any reasonable cause. He accordingly levied the aforesaid penalty.

5. The assessee preferred an appeal before the Commissioner (Appeals), New Delhi and reiterated the two reasons aforesaid as the causes for delay in the filing of the return. The learned Commissioner (Appeals) affirmed the order with the following observations : I have carefully considered the submissions made. Firstly, I find that Shri K.L.. Bhasin was merely an assistant accountant and not accountant or chief accountant. It is rather strange that departure of one person from accounts department and that also of an assistant accountant should cause so much delay in enabling the company to fulfil its statutory obligations. Secondly, the auditor's certificate shows that the final accounts of the company not only for the assessment year under appeal but also for two subsequent years were all placed before the auditors together only during May 1980. Therefore, the delay was not due to delay in finalising the audit. It would have perhaps been sufficient cause if the delay was due to audit. But in this case the delay occurred because

the company chose to place before the auditors three years' accounts long after the end of the accounting year, the reasons for which are not clear. Lastly, the learned counsel for the appellant can hardly draw any comfort from the Delhi High Court decision in *Nathmul Girdhari Lal v. CIT* [1980] 126 ITR 202 on which reliance was placed because in that case penalty under Section 271 (1)(i) was confirmed by the Court. From the above facts, it is clear that the conduct of the assessee-company also indicates that the company was conscious of its obligations but acted in total disregard of it. The IAC (Assessment) was, therefore, quite justified in levying the penalty.

The IAC (Assessment) is however directed to re-examine the contention relating to computation of penalty. Subject to this, the penalty is confirmed.

7. The learned counsel for the assessee contended that the return was delayed (i) because the dealing assistant Shri K.L. Bhasin had resigned on 9-8-1978 and no replacement could be procured ; (ii) that the accounts were under audit ; (iii) that the ITO kept the assessee busy with its assessments for the assessment years 1976-77 and 1977-78 and hence the assessee could not get sufficient time to prepare its return for assessment year in question ; (iv) that the Secretary of the assessee-company had died in March 1978, which also led to the delay in the filing of the return ; and (v) that Smt. Sahni, the wife of one of the ex-directors of the company had also died with the result that Shri Sahni, who though not on the board of directors was assisting the company, could not attend to the company's affairs. It was further contended on behalf of the assessee that penalty could not be levied on the assessee unless the department could show that there was any contumacious conduct on the part of the assessee and that the revenue had failed to discharge the initial burden on this account. It was also contended that interest under Section 139(8) of the Act amounting to Rs. 4,24,224 having been charged by the ITO, penalty under Section 271(1)(a) could not be levied in view of the judgment of the Hon'ble Supreme Court in *CIT v. M. Chandra Sekhar* [1985] 151 ITR 433.

8. The learned departmental representative, on the other hand, supported the orders of the authorities below.

9. We have given our careful consideration to the respective arguments on either side and we may take up the question of burden of proof first. The learned counsel for the assessee placed reliance on *Shakuntla Mehra v. CWT* [1976] 102 ITR 301, in which the Hon'ble Delhi High Court held that mere failure to file return within the time allowed did not make the assessee liable to penalty and that there had to be contumacious or deliberate default and also that the onus was on the department to establish that the assessee had no reasonable cause for not filing it within time. In that case the person obliged to file the return was a housewife whose case was that she was an uneducated lady and a widow and knew nothing about tax laws nor had dealt with any financial matters during the lifetime of her husband. Reliance was also placed on a later judgment of the Delhi High Court in *P.N. Sikand v. CIT* [1980] 126 ITR 202. In that case also it was held that the initial onus to prove that the assessee had no reasonable cause for the delay lies on the revenue. It was, however, observed that the initial burden is of a very slight nature. Observing about how this slight burden could be discharged, the Hon'ble Court observed as under : ... The assessee was aware of the time within which the return had to be filed and this is clear from the fact that he applied for extension of time till 30th September, 1963, which was granted. He did not make any further request for time. In two of the earlier years he had also filed returns rather late. He did not reply to the show-cause notice under Section 274/27 1(1)(a), duly served on him.

Despite another opportunity to represent his case, he neither appeared nor filed a reply. On the basis of these facts, which have been brought on record, it would be legitimate to infer that the department has shown that the assessee had no reasonable cause for filing the return late. The conduct of the assessee clearly indicates that he was conscious of his obligation and acted in total disregard of it. ... (p. 209) Reliance was also placed on a Full Bench judgment of the Hon'ble Gujarat High Court in *Addl. CIT v. I.M. Patel & Co.* [1977] 107 ITR 214.

In that case also it was held that the burden, though slight in nature, is on the revenue. Here again the Hon'ble Gujarat High Court pointed out how this slight initial burden may be discharged by observing at page 230 : "The department may discharge this initial burden by leading evidence to show, for example, that the

assessee had applied for extension from time to time and yet had failed to file the return within the extended time or the department may be in a position to show that the assessee concern was habitually filing returns beyond the time specified in every assessment year or on every possible occasion or the department may be able to show that the assessee was aware of the need to file the return within the time specified and yet had failed to do so." 10. The learned departmental representative did not cite any ruling to the contrary. Thus the initial burden did lay on the revenue but we have to see whether this burden stood discharged and the onus had shifted to the assessee.

11. In this case the assessee is a large public limited company which owns two sugar mills and earns large incomes. Its profit as per profit and loss account for the relevant accounting year ended on 30-6-1977 showed a net profit of Rs. 92,97,186. The assessee is being assessed to income-tax from before and it has never been its case that it did not know that it was under an obligation to file the return by 30-6-1978.

As a matter of fact, the two extension applications moved by the assessee show that the assessee was fully conscious of its obligation.

In view of these facts as observed by the Hon'ble Gujarat High Court in I.M. Patel & Co.'s case (supra), the initial burden that lay on the revenue stood well discharged and it was for the assessee to establish that it had a reasonable cause for the delay in the filing of the return.

12. We now come to the various causes advanced by the assessee for the delay in the filing of the return. The first contention is that Shri K.L. Bhasin, who is said to be a dealing assistant regarding tax matters had resigned and, therefore, the return could not be filed in time. As observed by the learned Commissioner (Appeals), Shri K. L.

Bhasin was merely an assistant accountant and the learned counsel for the assessee has not pointed out to any material on record to show that he was so placed in the assessee's organisation that in his absence a return could not be easily prepared. It is important to note that the return was due on 30-6-1978 and

Shri Bhasin is said to have resigned on 9-8-1978 and relieved with effect from 28-8-1978. In the first application for extension, it was stated that the accounts were under audit. A certificate from the auditors of the company placed at page 79A of the paper book shows that the accounts were placed before them for audit during May 1980 and the same were finalised on 31-5-1980.

Therefore, the contention that the return could not be filed because of Shri Bhasin's resignation is a mere pretext. Shri Bhasin had resigned on 9-8-1978 and was relieved after 20 days. If Shri Bhasin's presence for the filing of the return was necessary, the secretary, who ordered him to be relieved, would have got the needful done either by getting the return actually prepared or by taking necessary notes from Shri Bhasin. In our view, therefore, this contention was rightly rejected.

13. Now we come to the second cause advanced by the assessee that its accounts were under audit and the audit was not completed in time. As already stated, this was the cause advanced in the first application of the assessee dated 28-6-1978, a copy of which is placed at page 1 of the paper book. The certificate of the chartered accountants, a copy of which is placed at page 79A of the paper book falsifies the allegation made in the first application for extension of time for filing the return as this certificate shows that in or about June 1978, the assessee's accounts were not under audit. This certificate also falsifies the assessee's contention that any delay was caused by the auditors. This certificate shows that the accounts were placed before the auditors in May 1980 and the audit was completed quickly within that month. The delay, therefore, was on the part of the assessee in offering the accounts for audit and there is no explanation whatsoever why the assessee did not take steps to get its accounts audited quickly after the close of the accounting year. This cause, therefore, is not made out at all and does no credit to the assessee.

14. Now we come to the assessee's third contention raised before us that the ITO kept the assessee very busy in connection with the assessee's assessment for the assessment years 1976-77 and 1977-78. The assessment for the assessment year 1976-77 was completed on 14-9-1979 and that for 1977-78 on 25-3-1980. It is to be noted that no such cause was set up by the assessee before the ITO or

before the Commissioner (Appeals) and the learned counsel for the assessee relying upon CIT v.S.K. Sanjan Chettiar & Sons [1982] 134 ITR 647 (Mad.) contended that the assessee can set up a cause for delay for the first time in appeal before the Tribunal. That was a case in which no explanation for delay was offered either before the ITO or before the AAC. In the case before us, however, the assessee offered explanation in writing before the ITO and it also fought out the matter in appeal before the Commissioner (Appeals) relying upon the causes advanced before the ITO. Therefore, the ruling relied upon by the learned counsel does not help the assessee. In the present case notice under Section 274 of the Act was issued to the assessee in August 1984, i.e., long after the assessments for the assessment years 1976-77 and 1977-78 were completed and no reason is shown why this cause was not alleged by the assessee before the authorities below. The advancement of this cause before the Tribunal for the first time is, therefore, nothing but an attempt at improvement at every successive stage of litigation and has to be curbed. We, therefore, refuse to entertain this alleged cause.

15. In the alternative we find that the contention raised by the assessee is not correct. The only thing placed before us is a letter dated 8-8-1979 issued by the ITO to the assessee raising as many as 62 queries. The assessee replied by a letter dated 3-12-1979 and as already stated, the assessment Was completed in March 1980. Apart from the questionnaire and the assessee's reply, there is nothing to show that the assessee's staff or the counsel even during the period August 1979 to March 1980 were so busy that they could not attend to the preparation of return for the assessment year 1978-79. In our view, the contention is nothing but a pretext and is liable to be rejected.

16. The next contention raised before us was that the secretary of the company died in March 1978. This too is a reason advanced for the first time before this Tribunal and for reasons discussed above, we refuse to entertain it.

17. In the alternative, we find that the death of the secretary in March 1978 could not prevent the filing of the return in June 1978 or soon thereafter.

18. Lastly, it was contended that Mrs. Sahni, the wife of one of the ex-directors of the company, had died. This too is a new contention and is rejected for the reasons discussed above.

19. In the alternative, we do not find that the death of Mrs. Sahni standing alone or in the company of other circumstances could be a sufficient cause for the delay in the filing of the return. Admittedly Shri P.C. Sahni, whose wife died after a murderous assault on 18-12-1978 was not a director of the company. As already stated, the return in the present case was due on 30-6-1978 and even if the said P.C. Sahni had some concern with the assessee, the death of Smt. Sahni could not be a cause for the delay in the filing of a return that was due on 30-6-1978.

20. For the reasons discussed above, we agree with the authorities below that the assessee had no reasonable cause for the delay in the filing of the return.

21. As already stated, it was contended on behalf of the assessee that interest under Section 139(8) having been charged, no penalty under Section 271(1)(a) was leviable. Reliance was placed on M. Chandra Sekhar's case {supra}. That was a case pertaining to the assessment years 1959-60 to 1962-63 while in the case before us, we are concerned with the assessment year 1978-79. The provisions of Sub-section (8) of Section 139 were materially changed with effect from 1-4-1971 and it was provided that interest under Section 139(8) can be charged where the return is furnished after the specified date whether or not the ITO has extended the date for furnishing the return. Earlier interest under Section 139(8) could be charged only if the ITO had extended the date for filing of the return. It was on that basis that the Hon'ble Supreme Court held that when the ITO had charged interest under Section 139(8), it could be presumed that he had extended the time for filing of the return and no penalty could be levied as the return was filed within the extended time. In view of the amendment of Section 139(8) by the Taxation Laws (Amendment) Act, 1970, the aforesaid ruling of the Hon'ble Supreme Court cannot apply to the assessment year 1978-79. This contention, therefore, has to be rejected.

22. It was also contended on behalf of the assessee that no notice under Section 139(2) had been issued to the assessee and, therefore, the return having been

filed voluntarily, there was no contumacy on the part of the assessee. This contention too, in our view, has no force.

Such an argument can help an assessee who is ignorant of law. We have, however, before us an assessee, who is conscious of its legal obligation and knew fully well that it had to file a return of its income up to 30-6-1978. That is why it applied for extension of time twice. In such circumstances the non-issue of a notice under Section 139(2) can be of no avail to the assessee.

23. No other argument was raised before us and in view of the above discussion, we find no force in this appeal. It is accordingly rejected.

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