

Ranjit Sen Vs. Assistant Commissioner of

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Court : Income Tax Appellate Tribunal ITAT Kolkata

Decided On : Dec-16-1991

Reported in : (1992)40ITD528(Kol.)

Judge : D Meenakshisundaram, Vice

Appellant : Ranjit Sen

Respondent : Assistant Commissioner of

Judgement :

1. Since these two appeals involving common contentions are filed by the same assessee they are disposed of by a common order for the sake of convenience.
2. These appeals are directed against the penalties levied against the assessee under Sections 273 and 271(1)(a) of the Income-tax Act, 1961 for the assessment year 1980-81. The ITO had levied a penalty of Rs. 14,945 under Section 273 while the penalty levied under Section 271(1)(a) of the Act amounted to Rs. 27,898. These penalties were confirmed by the CIT (A). Aggrieved by these orders, the assessee has come up on further appeal to the Tribunal.
3. First, I shall deal with the appeal against the levy of penalty under Section 273 in ITA No. 3029 (Cal.)/89. This penalty had been levied by the ITO against the assessee for the reason that the assessee did not pay the advance tax of Rs. 1,83,481 as per the estimate of advance tax filed by him on 15-3-1980 and that the explanation offered by the assessee for such failure was not acceptable. It is for

this reason that the ITO imposed the minimum penalty of Rs. 14,945 under Section 273, obviously Sub-section (b) of Section 273 of the Act. The CIT (A) confirmed this penalty by pointing out that paucity of funds was not a reasonable cause for non-payment of advance tax and that it was a case of sheer negligence on the part of the assessee in paying Government dues.

4. Before me, Shri S.N. Rotho, the learned Counsel for the assessee raised three objections. His first line of attack was that the present penalty levied by the ITO was unsustainable in law as there was no satisfaction on the part of the ITO while completing the assessment of the assessee on 28-3-1990, pursuant to the appellate order of the CIT (A) setting aside the earlier assessment made by the ITO on 20-9-1985 with directions to make a fresh assessment. The learned Counsel referred me to page 1 of his paper book which contained the final assessment order passed by the ITO on 28-3-1990 under Section 143(3)/251 of the Act and pointed out that this order did not record any satisfaction on the part of the ITO before completing the assessment for initiating penalty proceedings against the assessee either under Section 273 or under Section 271(1)(a) of the Act and that the order sheet of the ITO also did not contain any such recording of satisfaction on the part of the ITO, as required by law. In this connection, Shri Rotho referred to the penalty orders where the ITO relied on the initiation of penalty proceedings at the time of completion of the assessment on 20-9-1985. The learned Counsel submitted that satisfaction on the part of the Assessing Officer while completing the assessment is a condition precedent for initiation of penalty proceedings and in the absence of any evidence to establish such satisfaction, no penalty could be levied against the assessee either under Section 273 or under Section 271(1)(a) of the Act. In support of his submissions, the learned Counsel relied on the decision of the Supreme Court in the case of D.M. Manasvi v. CIT [1972] 86 ITR 557. He also relied on the decision of the Delhi High Court in the case of Jiten & Co. v. STO [1977] 39 STC 308 regarding the meaning of 'satisfaction' contemplated by law.

5. The learned Departmental Representative, Shri J. Mukhopadhyay submitted that the initiation of penalty proceedings in the course of assessment proceedings which was completed on 20-9-1985 was sufficient compliance with the provisions

of law and that, therefore, the decision relied on by the assessee's learned Counsel would be inapplicable to the facts of the present case.

6. In reply, Shri Rotho, the learned Counsel for the assessee pointed out that the assessment order relied on by the learned Departmental Representative had been set aside on appeal by the CIT (A) with directions to make a fresh assessment after due enquiry. Therefore, the earlier assessment order was no longer in existence and, therefore, would be of no avail to the Department.

7. The facts of the present case show that in this case the assessment was originally made on 6-9-1982 under Section 144 of the Act which was later on reopened under Section 146 of the Act and a fresh assessment was made on 20-9-1985 under Section 143(3)/146/144B(5) of the Act. This assessment order was set aside on appeal by the CIT (A) - IV, Calcutta, as could be seen from the opening paragraph of the assessment order dated 28-3-1990 out of which the present penalty proceedings had arisen. This appellate order of the CIT (A) was passed on 10-12-1987 and in this order he had set aside the assessment, (which was completed on a total income of Rs. 3,23,810 on 20-9-85), with directions to make a fresh assessment after due enquiry and after giving the assessee a reasonable opportunity of being heard. Pursuant to this appellate order, the ITO had issued notices under Sections 143(2) and 142(1) of the Act and passed a fresh assessment order on 28-3-1990 under Section 143(3)/251 of the Act determining the assessee's total income at Rs. 1,07,960. There is no dispute that in this assessment order dated 28-3-1990 there is no recording of satisfaction on the part of the Assessing Officer in regard to the defaults alleged to have been committed by the assessee under Sections 273 and 271(1)(a) of the Act.

It is also not the case of the Department that before completing the assessment on 28-3-1990 the ITO had recorded his satisfaction in this regard in his order sheet and directed the initiation of penalty proceedings against the assessee under Sections 273 and 271 (1)(a) of the Act. In fact, the two penalty orders passed by the ITO refer to the initiation of penalty proceedings at the time of completion of the assessment on 20-9-1985 which has since been set aside as stated above.

On these facts, the ratio of the decision of the Supreme Court in the case of DM. Manasvi (supra) is directly applicable. In this decision, the Supreme Court held that what is contemplated by Section 271(1)(a) is that the ITO should have been satisfied in the course of assessment proceedings regarding matters mentioned in clauses of that sub-section, that it is not essential that the notice to the person proceeded against should have also been issued during the course of the assessment proceedings, but that satisfaction, in the very nature of things, precedes the issue of notice and it would not be correct to equate the satisfaction of the ITO with the actual issue of notice.

Their Lordships also held that proceedings for the imposition of penalty under Section 271(1) of the Act have necessarily to be initiated by the ITO or the AAC and that it is the satisfaction of the ITO in the course of the assessment proceedings regarding the concealment of income which constitutes the basis and foundation of the proceedings for levy of penalty. This decision of the Supreme Court has been followed in a number of cases and in the case of Jiten & Co.

(supra) the Delhi High Court held that to be satisfied with a state of things means to be honestly satisfied in your own mind, that the satisfaction of one Sales Tax Officer cannot be said to be the satisfaction of another officer, that satisfaction is essentially a condition of the mind and that it means that there is substantial ground for the conclusion on the material available that the dealer against whom it is sought to bring the penalty proceedings has concealed sales and furnished inaccurate particulars and has thereby returned figures below the real amount. In other words, the Delhi High Court held that under Section 22A(1) of the Bengal Finance (Sales Tax) Act, 1941 (as extended to the Union Territory of Delhi), the phrase 'is satisfied' means simply 'makes up his mind', that the assessing authority has to make up his mind, i.e., the authority has to form a prima facie view that it is a case where, subject to what the dealer may have to say, he should initiate action under Section 22A so that the majesty of the law is upheld and the dealer finds it unprofitable to conceal sales. The Delhi High Court further held that the authority should reach a clear conclusion that a good ground exists for launching penalty proceedings and that it is this satisfaction which is the foundation of action under Section 22A(1).

8. I am of the view that these two decisions relied on by the assessee's learned Counsel fully support his contentions against the validity of the penalties levied by the ITO. There is no material to establish the satisfaction of the assessing authority in the course of the fresh assessment proceedings made on 28-3-1990. The assessing authority cannot fall back on the penalty proceedings initiated by his predecessor at the time of the assessment made on 20-9-1985 since the said assessment no longer exists in the eye of law as it has been set aside. I, therefore, accept the contentions of the learned Counsel for the assessee that the penalties levied both under Section 273 and under Section 271(1)(a) of the Act without recording the satisfaction of the ITO in the course of assessment proceedings made on 28-3-1990 are clearly bad in law and hence unsustainable. This itself is sufficient to dispose of both the appeals. However, for the sake of completeness I will deal with the other contentions raised by the assessee's learned Counsel in both the appeals.

9. The second line of attack against the penalties is that the penalty orders are cryptic as the assessee's explanations have not been considered and that, therefore, they are liable to be struck down on this ground also. Shri Rotho further argued that the appellate orders of the CIT (A) also suffer from the same vice and, therefore, the assessee is entitled to succeed on this ground as well. In support of his contentions, the learned counsel relied on the decision of the Supreme Court in *Sampat Tatyada Shinde v. State of Maharashtra* AIR 1974 SC 791. The learned Departmental Representative submitted that the orders of the Departmental authorities showed that they had considered whatever arguments had been placed by the assessee before them and, therefore, the decision relied on by the assessee's learned Counsel would be inapplicable. He argued that the orders in question cannot be faulted on the ground that they are not speaking orders.

10. On a careful consideration of the submissions set out above, I am inclined to agree with the assessee's learned Counsel on this issue also. The penalty orders, apart from stating that the assessee's explanations are not acceptable, do not state any reason as to why they are not acceptable. In *Sampat Tatyada Shinde's* case (supra), Their Lordships of the Supreme Court held as follows :-- Time and again this Court has pointed out that an appeal which raises arguable questions,

either factual or legal, should not be summarily dismissed without recording a reasoned order. *Travancore Rayons Ltd. v. Union of India* AIR 1971 SC 862, the Supreme Court explained the necessity for passing a speaking order in the following words of Justice Shah (as His Lordship then was): -- Necessity to give sufficient reasons which disclose proper appreciation of the problem to be solved, and the mental process by which the conclusion is reached in cases where a non-judicial authority exercises judicial functions, is obvious; when judicial power is exercised by an authority normally performing executive or administrative functions, this Court would require to be satisfied that the decision has been reached after due consideration of the merits of the dispute, uninfluenced by extraneous considerations of policy or expediency; the court insists upon disclosure of reasons in support of the order on two grounds one. that the party aggrieved, in a proceeding before the High Court or this Court, has the authority to demonstrate that the reasons which persuaded the authority to reject his case were erroneous; the other, that the obligation to record reasons operates as a deterrent against possible arbitrary action by the executive authority invested with the judicial power.

This passage is quoted by the Delhi High Court in the case of *Bharat Nidhi Ltd. v. Union of India* [1973] 92 ITR 1 at page 4. Respectfully following these two decisions of the Supreme Court, I accept the contentions of the assessee's learned Counsel on this issue also.

11. This takes me to the last contention of the assessee which is on the merits in this appeal. The learned Counsel submitted that the penalty in question had been levied for non-payment of advance tax by the assessee, and not for any default under Section 273(6) of the Act.

He pointed out that the Income-tax Officer had levied a penalty of Rs. 9,170 under Section 221/210 of the Act on 16-12-1980. He further pointed out that the facts mentioned in the penalty order showed that there was no default committed by the assessee under Section 273(6) of the Act as he had filed an estimate of advance tax on 15-3-1980 as accepted by the ITO in the penalty order. He, therefore, argued that the levy of penalty itself was totally misconceived on the facts of the

case.

Finally, the learned Counsel pleaded, in the alternative, that the penalty levied was highly excessive having regard to the total income of Rs. 1,07,960 finally determined by the assessment order dated 28-3-1990, on which the tax due has been assessed at Rs. 76,694 as per the demand notice, and that the minimum penalty of 10 per cent leviable would be much less and that the same should be reduced accordingly.

12. Shri J. Mukhopadhyay, the learned Departmental Representative submitted that mere filing of an advance tax estimate would not be sufficient compliance with the provisions relating to advance tax and that the failure on the part of the assessee to pay the advance tax on the basis of the said estimate would certainly justify the imposition of penalty under Section 273(6) of the Act. He further submitted that the penalty levied under Section 221 was cancelled by the CIT under Section 264 of the Act on 31-1-1983 and that, therefore, a reference to the levy of penalty under Section 221 would be of no relevance, as the present penalty proceedings in the present case were initiated much later on the completion of the regular assessment on 20-9-1985.

13. One thing is clear from the facts stated above that the penalty in question has been levied not for any failure on the part of the assessee to file an estimate of advance tax as required by law. In fact, the opening sentence in the penalty order dated 18-12-1987 under Section 273 of the Act shows that the penalty proceedings had been initiated for non-payment of advance tax as per the estimate filed by the assessee on 15-3-1980. Therefore, it is clear that there was no default committed by the assessee within the meaning of Section 273(b) of the Act. When there is no default committed by the assessee under Section 273(6) there can also be no penalty for a non-existing default.

If there was any failure on the part of the assessee in paying the advance tax, separate proceedings under Section 221 had to be taken. In fact, such proceedings were also taken and a penalty was levied under Section 221 which was also cancelled by the CIT under Section 264 of the Act, as stated above. Apparently, it is for this reason that the Assessing Officer, while completing the

present assessment, was satisfied that there was no case for initiating penal action against the assessee for a default under Section 273 of the Act when he completed the assessment on 28-3-1990. I, therefore, hold that there was no default committed by the assessee within the meaning of Section 273(6) of the Act as he had admittedly filed an estimate of advance tax on 15-3-1980, as accepted by the ITO in the penalty order. Therefore, the penalty levied is clearly unsustainable. Accordingly, I cancel the penalty levied under Section 273(b) of the Act and direct that the amount of penalty shall be refunded to the assessee, if already collected from him. In this view of the matter, it is not necessary to consider the alternative plea of the appellant on the quantum of minimum penalty leviable in this case, as the entire penalty itself is deleted.

14. Now, I shall deal with the other appeal in ITA No. 3030 (Cal.)/89 against the levy of penalty under Section 271(1)(a) of the Act. This penalty has been levied by the ITO for an alleged default on the part, of the assessee in the submission of the return of income for the assessment year 1980-81 for a period of 7 months without reasonable cause. Accordingly, the ITO had imposed a penalty of 14 per cent of the assessed tax at the rate of 2 per cent for each completed month of default from 1-1-1982 to 31-7-1982. The penalty levied under Section 271(1)(a) is Rs. 27,898. This has been upheld by the CIT (A) as justified on the ground of non-cooperation with the Department by the assessee, which was manifest in the late filing of the return as well as negligence regarding his statutory responsibilities. The first two objections of the assessee's learned Counsel are identical to the two objections raised by him in the appeal against the penalty under Section 273 which I have disposed of in ITA No. 3029 (Cal)/89 in paragraphs 3 to 9 supra. Therefore, for the reasons discussed in paragraphs 3 to 9, the two objections raised by the assessee's learned Counsel are upheld and decided in favour of the appellant in the matter of this penalty under Section 271(1)(a) of the Act also.

15. This takes me to the assessee's contentions on the merits against the levy of penalty under Section 271(1)(a) of the Act. Shri Rotho submitted that the penalty order clearly established that the assessee had applied for extension of time from time to time up to 31-12-1981, which had been found to be acceptable and constituted a reasonable cause for the delay in the submission of the return up to

that date.

The learned Counsel submitted that the same reasons which held good as reasonable cause up to 31-12-1981 would continue to hold good as reasonable cause for the period beyond 31-12-1981 to 19-8-1982 also, when the assessee filed his return of income for this year. In this connection, the learned Counsel pointed out that the assessee's main source of income was his share of income from a partnership firm known as R. Sen & Co. (Metal Division) and that as the accounts of the said partnership firm were not complete it was not possible for the assessee to ascertain his correct amount of share income before the filing of his return of income for the year under appeal. The learned Counsel also submitted that added to this reason, the assessee's Accountant, Shri Kamal Ghosh who was looking after his file remained sick and, therefore, it also accounted for the delay in the filing of the return as he had kept the papers and files of the assessee with him. The learned Counsel argued that the conduct of the assessee showed that another application would have been filed as there was no reason as to why the assessee would have ignored to do so, particularly when he had filed applications for extension of time earlier till 31-12-1981.

However, the assessee's Counsel pleaded his inability to produce any evidence that any such application was made in form No. 6 praying for extension of time till 30-9-1982. Alternatively, the learned Counsel pleaded that having regard to the conduct, of the assessee, it could only be a case of technical or venial breach of the provisions of the Act for which no penalty need be levied. In support of his contentions, the learned Counsel relied on the decision of the Supreme Court in the case of Hindustan Steel Ltd. v. State of Orissa [1972] 83 ITR 26. He submitted that there was no contumacious conduct on the part of the assessee and, therefore, the penalty should be cancelled. Without prejudice to the above submissions, the learned Counsel submitted in the alternative, that the penalty levied was highly excessive in the light of the final amount of tax determined as a result of the final assessment order passed by the ITO on 28-3-1990 and that the penalty should be accordingly reduced.

16. The learned Departmental Representative, Shri J. Mukhopadhyay opposed these submissions of the learned Counsel for the assessee and contended that to the extent the assessee had complied with the requirements of law by applying for extension of time in form No. 6, the Department has been fair by condoning the delay, but that there was no cause much less reasonable cause shown by the assessee. for the period of delay of 7 months from 1-1-1982 to 31-7-1982 and that, therefore, the levy of penalty for this period of 7 months was fully justified and rightly levied in accordance with law. Shri Mukhopadhyay argued that the decision of the Supreme Court in the case of Hindustan Steel Ltd. (supra) relied on by the assessee's learned Counsel is inapplicable to the facts of the present case in the light of the latest decision of the Supreme Court in the case of Gujarat Travancore Agency v. CIT [1989] 177 ITR 455, wherein Their Lordships held that in the case of proceedings under Section 271(1)(a) of the Act the intention of the Legislature is to emphasise the fact of loss of revenue and to provide a remedy for such loss, although no doubt an element of coercion is present in the penalty, that, in this connection, the terms in which the penalty falls to be measured are significant, that unless there is something in the language of the statute indicating the need to establish the element of mens rea, it is generally sufficient to prove that a default in complying with the statute has occurred and that there is nothing in Section 271 (1)(a) which requires that mens rea must be proved before penalty can be levied under that provision. The Departmental Representative, therefore, argued that the penalty levied should be upheld. However, he fairly stated that the assessee would be entitled to the consequential relief due to him in the light of the tax determined in the final assessment order passed by the ITO on 28-3-1990.

17. On a careful consideration of the submissions urged on both sides, I am of the considered view that this is not a fit case for levy of penalty under Section 271(1)(a) of the Act for the following reasons.

There is no dispute that the assessee had applied for extension of time on 7-1-1981 up to 30-6-1981 and again on 29-6-1981 up to 31-12-1981.

There is no dispute that the reasons stated by the assessee in both the applications for extension of time constituted 'reasonable cause' for the delay in

the submission of the return. The default on the part of the assessee is for a period of 7 months from 1-1-1982 to 31 -7-1982.

The reason for the delay has been explained by the assessee in his reply to the penalty notice dated 30-9-1987 wherein he had clearly stated that his main source of income is his share of income from a registered partnership firm, R. Sen & Co. (Metal Division) and that as the accounts of the said firm were incomplete it was not possible for him to ascertain his share of income nor was it possible for him to estimate his income for the purpose of filing his return. He had also stated that on account of illness of his Accountant, Shri Kamal Ghosh, who had kept his papers and files and was attending to his income-tax matters, there was some delay in the filing of the return. None of these reasons stated by the assessee have been found to be incorrect either by the ITO or the CIT(A). On the contrary, the conduct of the assessee in applying for extension of time on two occasions shows his anxiety to be on the right side of law and to comply with his statutory obligations. The fact that the assessee did not apply for further extension of time beyond 1-1-1982 did not justify the inference that he had acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of his statutory obligation. To my mind, the present case seems to be a case of a technical or venial breach of the provisions of law for which no penalty need be levied, as held by the Supreme Court in the case of Hindustan Steel Ltd. (supra) referred to above. The decision of the Supreme Court in the case of Gujarat Travancore Agency (supra) is not applicable to the facts of the present case as we are not concerned with the question of mens rea but with the question of 'reasonable cause' for the delay in the submission of the return by the assessee.

Further, the assessment of the assessee for the assessment year 1980-81 had a chequered career, as could be seen from the fact that the assessment originally made under Section 144 on 6-9-1982 was later on reopened under Section 146 and a fresh assessment was made on 20-9-1985 under Section 143(3)/146 & 144B(5) of the Act. Again, this assessment was set aside on appeal by the CIT(A) by his order dated 10-12-1987 and, finally, the present assessment has been made on 28-3-1990 practically accepting the assessee's contentions which he had been urging before the departmental authorities in the appellate proceedings at the

various stages. As against the total income of Rs. 98,940 returned by the assessee in his return filed on 19-8-1982 the total income now determined after eight years on 28-3-1990 amounts to Rs. 1,07,960. I am referring to these facts only to show that there could be no contumacious conduct on the part of the assessee in delaying the return of income for a further period of 7 months from 1-1-1982 to 31-7-1982. I, therefore, respectfully follow the decision of the Supreme Court in the case of Hindustan Steel Ltd. (supra) and hold that no penalty is leviable under Section 271 (1)(a) of the Act for the period of delay of 7 months from 1-1-1982 to 31 -7-1982 which was a case of technical or venial breach of the provisions of law on the facts of this case. Accordingly, I cancel the penalty levied by the ITO which shall be refunded to the assessee, if already collected from him.

In this view of the matter, it is unnecessary to consider the alternative contentions on the quantum of penalty leviable with reference to the tax finally assessed.

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