**Burlingtons' Of Calcutta Vs. Assistant Commissioner Of**

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**SooperKanoon Citation** : sooperkanoon.com/66341

**Court** : Income Tax Appellate Tribunal ITAT Kolkata

**Decided On :** Aug-06-1993

**Reported in** : (1993)47ITD543(Kol.)

**Judge** : N Pachuau, R Easwar

**Appellant** : Burlingtons' Of Calcutta

**Respondent** : Assistant Commissioner Of

**Judgement** :
1. These appeals filed by the assessee relate to the assessment years 1982-83 and 1983-84. They are directed against the consolidated order of the CIT (A) by which he sustained the penalties imposed under Section 271(1)(a) of the Act on the assessee for a period of 10 months.

The penalties sustained by the CIT (A) are Rs. 11,962 and Rs. 9,848 respectively.

2. The assessee is a registered firm carrying on business in Calcutta.

The accounting years ended on 31-1-1982 and 31-1-1983. The returns were due on 30-6-1982 and 30-6-1983. On 20-7-1982. there was a search in the assessee's business premises and the books of account were seized. On 11-7-1984, the ITO issued notices under Section 148 of the Act calling upon the assessee to file returns of income for the two years. In response thereto, the assessee filed the returns for both the years on 25-3-1985. On completion of the assessments, the ITO initiated proceedings for imposing penalties for the delayed submission of the returns. The assessee offered its explanation in writing. It was explained on behalf of the assessee that because of the seizure of the books of account the assessee could not file the returns of income in time. In this connection it was pointed out that in spite of the repeated requests by the assessee, the assessee was not allowed to make inspection of the books and take out copies thereof, which would have facilitated the due submission of the returns. It was also explained that there were frequent changes in the accountants of the assessee-firm which also contributed to the delay. Lastly, it was submitted that the delay was neither intentional nor wilful and should not be penalised.

3. The ITO did not accept the explanation. He pointed out that the assessee did not formally approach the department for inspection of the seized books and for permission to take out copies thereof. The other explanation, namely, change of accountants was not considered reasonable. He, therefore, imposed penalties on the assessee under Section 271 (1)(a) of the Act. He computed the period of default as 32 months for the assessment year 1982-83 and 20 months for the assessment year 1983-84. He levied penalties of Rs. 38,277 and Rs. 19,657.

4. The assessee filed appeals before the CIT (A). The explanation furnished before the ITO was repeated. The CIT (A) considered it fair to accept the explanation that the seizure of the books on 20-7-1982 must have caused difficulties in the proper compliance with the Income-tax Act. He, however, noticed that the assessee had taken its own time to formally approach the department for permission to take out copies from the seized accounts and, therefore, it would not be proper to consider the entire period of delay up to March 1985 as having been caused only by the seizure. In this view of the matter he scaled down the period of default to 10 months in each year as being attributable to the assessee. The penalties were, therefore, reduced to Rs. 11,902 and Rs. 9,848.

5. The department is not in appeal before us. The appeals are at the instance of the assessee. The learned representative for the assessee repeated the contentions raised before the deptl. authorities and submitted that on the facts of the case and having regard to the assessee's explanation, the CIT(A) should have cancelled the penalties instead of sustaining the penalties for the period from May

1984 up to March 1985. He filed an affidavit dated 20-7-1993 sworn by H.O. Sood, stated to be one of the partners of the assessee-firm in support of the claim that the assessee had been making repeated requests to the ITO for inspection and for allowing copies of the seized books to be taken.

It was pointed out some seized books related to the accounting year ended 31-1-1981 also and the department would not allow the assessee to take copies from the seized books until the assessment for the assessment year-1981-82 was completed, which was done on 28-12-1984. He also referred to the decision of the Delhi High Court in Thanthi Trust v. CIT [1987] 167 ITR 397 and the decision of the Bombay High Court in Gupta Builders (P.) Ltd. v. CIT [1991] 191 ITR 114 in support of his contention that seizure of books of account was a reasonable cause for the purpose of Section 271(1)(a).

6. The next contention on behalf of the assessee was that if the advance-tax, tax deducted at source and the refund due to the assessee in respect of the earlier years are taken into account, there will be no tax due from the assessee on completion of the assessments and, therefore, no penalty can be imposed under Section 271 (1)(a) of the Act by treating the assessee as unregistered firm under Section 271(2).

In this connection the Ld. representative for the assessee drew our attention to the following decisions : It was also submitted by the Ld. representative for the assessee that the delay in filing the returns was not wilful or intentional, but, due to the circumstances beyond the control of the assessee for which no penalty can be justifiably imposed.

8. On a careful consideration of the rival contentions, we are of the view that the penalties sustained by the CIT (A) have to be cancelled.

It is not disputed that the books of account that were seized on 20-7-1982 related to the accounting years ended 31-3-1981, 31-1-1982 and for the period 1-2-1982 up to 20-7-1982. When the books of account are seized, naturally the assessee is handicapped in filing the returns of income. The accounts of the year ended 31-1-1982 cannot be finalised in the absence of the books of account. For the immediately earlier accounting year there may be certain balances to be carried forward or adjusted in the books of account for the accounting year ended 31-1-1982. As far as the books of account for the year ended 31-1-1983 are concerned, the books of account up to 20-7-1982 have been seized.

It is, therefore, not possible for the assessee to finalise the accounts for the year ended 31-1-1983 in the absence of the books of account for the earlier part of the year. The Orissa High Court has held in CIT v. Dilsukhrai Ranglal [1976] 104 ITR 60 that even the statute has given a period of 3 to 4 months from the end of the accounting year for the purpose of making the return. It was further held that in a case where the books of account have been seized, a longer period would be reasonable having regard to the volume of the business transactions. In the present case, the CIT (A) was prepared to excuse the delay up to May 1984. It is only the period of delay beyond May 1984 for which the penalty has been sustained by him. In the absence of any appeals filed by the department questioning the acceptance of the delay up to May 1984, we have to only see whether the reasonable cause continued even after May 1984 so as to exonerate the assessee from the penalty. The CIT (A) has made a point against the assessee that it has taken its own time to file a petition to the department seeking permission for taking copies. The assessee filed the petition only on 16-3-1985. But, we have before us the affidavit of the partner of the assessee-firm that even before a formal petition was filed the assessee has been repeatedly making oral requests to the ITO seeking permission to take copies of the seized books. We have no reason to disbelieve the averment made in the affidavit. The assessee has been pointed out even during the penalty proceedings that its authorised representative and Mr. Sood the partner of the assessee-firm, have been making requests to the ITO even before 16-3-1985 to allow them to take out copies from the seized books. We find from the penalty orders that this specific plea has been rejected by the ITO only on the ground that there is no record to prove that the assessee made such requests. The ITO, while rejecting this plea, has overlooked that the assessee had explained that it had made oral requests to the ITO and there -can possibly be no record to prove this fact. However, a perusal of the assessment order dated 28-12-1984 for the assessment year 1981-82 shows that the assessment for that year was completed only after scrutiny of the seized books relating to that year. It is, therefore, logical to presume that the department would have allowed the assessee to inspect the books of account and take out copies therefrom only after the completion of the assessment for the assessment year 1981-82. The Ld. representative for the assessee repeatedly asserted that the ITO had told the assessee that only after the completion of the assessment for the assessment year 1981-82 the assessee would be allowed an opportunity to examine the seized books.

There appears to be some credibility in such assertion. However, even if it is assumed that the assessee made no such request before the ITO and the first request for inspection of the seized books was made only by petition dated 16-3-1985, that by itself cannot be good reason to sustain the penalty. At the worst, it can only be stated that the assessee should have been more vigilant in pursuing its remedies before the deptl. authorities. Such lack of vigilance or alertness on the part of the assessee cannot take away or detract from the reasonableness of the cause for the delay in filing the returns, namely, the seizure of books. It is to be noted that as soon as the permission was granted on the assessee's petition dated 16-3-1985 the assessee had gone about the matter in great despatch and has ultimately filed returns for both the years within a week i.e., on 25-3-1985. We are, therefore, satisfied that the seizure of the books of account constituted sufficient or reasonable cause for the delay in filing the return for both the years.

The CIT (A) having accepted in principle that the seizure of the books would constitute reasonable cause, was not justified in sustaining the penalties for the period from May 1984 to March 1985. For the same reason he should have cancelled the penalties imposed on the assessee.

We may refer to the decision of the Supreme Court in Hindustan Steel Ltd. v. State of Orissa [1972] 83 ITR 26 where it has been held that penalty should not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of the statutory obligation. On the facts of the present case it cannot be stated that the assessee has acted in such conscious disregard and in defiant manner.

9. We also find that the income-tax on the income of the assessee-firm after the order of the CIT(A) in quantum appeals is only Rs. 27,495 and Rs. 19,422. Against these figures, the assessee has paid advance-tax of Rs. 24,572 and Rs. 16,280 respectively. Thus only a small amount of tax remained to be paid. Ultimately, in the orders dated 6-5-1987 and 13-7-1987 passed under Section 251 of the Act to give effect to the orders in the quantum appeals, we find that the refunds for the earlier years had been adjusted against the tax demand and ultimately refund of Rs. 3,895 and Rs. 264 has been found due for the two years respectively. This fact only shows that the assessee could not have deliberately withheld the tax by delaying the filing of the returns of income. As held by the Madras High Court in S. Loonkaran & Sons v. CIT [1977] 108 ITR 92 it would be a reasonable inference that the assessee stood nothing to gain by delaying the returns deliberately, in view of the small tax due.

10. For the aforesaid reasons, we cancel the penalties sustained by the CIT(A) for both the years.

11. Since we have cancelled the penalties, we are not considering the argument advanced by the assessee based on the decisions of the Rajasthan and Punjab and Haryana High Courts. The appeals are allowed.