Cit Vs. Superintending Engineer

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Court : Rajasthan

Decided On : May-11-2002

Reported in : (2002)177CTR(Raj)586

Appeal No. : IT Ref. No. 17 of 1996 11 May 2002 A.Y. 1988-89 & 1989-90

Appellant : Cit

Respondent : Superintending Engineer

Advocate for Pet/Ap. : Sundeep Bhandawat, *for the Revenue* R.L. Jangid, *for the Assessee*

Judgement :

N.N. Mathur, J.

The Tribunal, Jaipur Bench, has made this reference seeking opinion of this court on the following questions :

'1. Whether, on the facts and in the circumstances of the case, the Tribunal is legally justified in cancelling the penalty imposed under section 272A(2)(c)

2. Whether the Tribunal was right in law in holding that no penalty is leviable even though they have held that the assessee has committed a default without reasonable cause?

3. Whether the Tribunal is right in observing that the words 'deductible' or 'collectible' used in the amended provisions of section 272A(2)(c) with effect from 1-10-1991, mean the amount of tax which remains to be 'deducted' or 'collected'?

4. Whether the Tribunal was right in law in holding that the monetary limit in respect of penalty under section 272A(2)(c) prescribed with effect from 1-10-1991, was applicable to defaults committed earlier as well?

5. Whether the Tribunal was right in law in holding that proviso to section 272A(2)(c) was a procedural provision and, therefore, applied to all pending matters?'

2. Necessary facts giving, rise to the instant reference are that the respondent-Superintending Engineer, Circle-I PWD, Udaipur, is the person responsible for paying the tax on income chargeable to tax under the head 'Salaries' to the employees working under him. He is also responsible under section 206 of the Act of 1961, for deducting tax at source under Chapter XVII and prepare, deliver or cause to be delivered to the prescribed income-tax authority within the prescribed time after the end of the each financial year, a return of the tax deducted in the prescribed Form No. 24. Though the respondent duly deducted the tax at source before making the payment of salaries to his employees and also deposited the same with the State Exchequer in time, yet he failed to file the return of such deductions made in 1987-88 and 1988-89 within the prescribed time. The only explanation given for the delay is ignorance of the relevant provisions of the Income Tax Act. In the opinion of the Dy. Commissioner, there was no reasonable cause for delay and, as such, he levied penalty under section 272A(2) of the Act of 1961 of Rs. 3,450 for delay of 345 days for the year 1987-88 at the rate of Rs. 10 per day and Rs. 22,800 for delay of 228 days in 1988-89 at the rate of Rs. 100 per day. The respondent unsuccessfully carried the matter before the Commissioner (Appeals) by way of appeal. In the second appeal before the Tribunal, the plea of ignorance of law was rejected. However, the Tribunal held that in view of the proviso appended to section 272A(2), the levy of penalty was unsustainable. The Tribunal held that the amount of tax already deducted should normally not attract the levy of penalty and it is the amount of tax not deducted or remained

uncollected, which attracts penalty under the amended provisions of law. The Tribunal found that in the instant case, there was no amount of tax 'deductible' or 'collectible' and, as such, there could be no levy of penalty under section 272A(2)(c) of the Act. As regards the applicability of the amended provision, the Tribunal observed that the amendments being procedural in nature, the same have retrospective effect. Thus, the Tribunal allowed the appeal of the respondent and quashed the levy of penalty.

3. It is not in dispute that the respondent being the 'Head' of the office, is the person, responsible for paying the tax on income chargeable to tax under the head 'Salaries' to the employees working under him. Thus, under section 192 of the Act of 1961, he was under the statutory obligation to deduct tax before disbursing salaries to the employees. Being aware of that, the respondent discharged the obligation by deducting the tax at source. Another part relating to his statutory obligation was to file return of such deductions within the prescribed time before the prescribed authority as required by section 206 of the Act of 1961. Admittedly, the respondent failed to discharge the obligation under section 206 of the Act. Section 272A(2)(c) provides levy of penalty in case of such default. It would be convenient to read section 272A(2)(c), which is extracted as follows:

'Section 272A(2) : if any person fails

(a) ...

(b) ...

(c) to furnish in due time any of the returns, statements or particulars mentioned in section 133, 206, 206C, 285B;

he shall pay, by way of penalty, a sum of one hundred rupees for every day during which the failure continues:

Provided that the amount of penalty for failures in relation to a declaration mentioned in section 197A, a certificate as required by section 203 and returns under sections 206 and 206C shall not exceed the amount of tax deductible or collectible, as the case may be.'

4. A plain reading of the above provision makes it clear that section 272A(2) provides the mechanism for working out the amount of penalty which may be imposed inter alia, for default of furnishing the return under section 206 beyond the prescribed limit. The penalty is to be calculated with reference to the days of default and computed at the prescribed rates. In the application of the prescribed rates, the authority levying the penalty has been given some discretion. The proviso to section 272A(2) provides an outer limit, to the extent the penalty may be imposed. It provides that a penalty shall not exceed the amount of tax deductible or collectible. The Tribunal laid much emphasis on the words 'deductible' and 'collectible'. In the opinion of the Tribunal, the amount of tax, which has been deducted or collected, would be called 'tax deducted' or 'tax collected'. The Tribunal further found that part of the amount of tax which remains to be deducted or collected, would fall within the purview of expression 'tax deductible or collectible'. Thus, in case no amount is 'deductible' or 'collectible' no penalty under section 272A(2)(c) can be levied. The view of the Tribunal is extracted as follows :

'The former expression refers to an incomplete act or an act yet to be done, the latter to a completed act or act already done. The amount of tax already 'deducted' or 'collected' should normally not attract levy of penalty. But the amount of tax which remains to be deducted or collected may also attract levy of penalty. In its wisdom, the legislature has thought it proper to use the terms 'deductible' or 'collectible' and not the terms 'deducted' and 'collected' in the language of the proviso to section 272A(2) of the Act. The penalty intended to be levied for failure to file the return under section 206 or 206C within the specified time, is certainly to have a relation to the duration of the period of default but at the same time such penalty, irrespective of the duration of the period of default is not to exceed the amount of tax deductible or collectible as the case may be. It means that the mandate contained in the proviso to section 272A(2) has an overriding effect over the main provisions contained in section 272A(2). It, therefore, follows that in a case wherein there is no amount of tax 'deductible' or 'collectible' as the case may be, no penalty under section 272A(2)(c) can be levied, the period of default notwithstanding. In the instant case since, admittedly, there was no amount of tax deductible or collectible, there can be no levy of penalty under section 272A(2)(c) of the Act.'

5. We are unable to agree with the aforesaid view of the Tribunal. A plain reading of the provision clearly shows that it only provides an outer limit of the penalty. The words 'deductible' or 'collectible' have been used only with reference to the quantum of penalty to be levied. If the view of the Tribunal is accepted, the proviso will defeat the very purpose of the substantive provision under section 272A(2)(c). The purpose of levy of penalty under section 272A(2)(c) appears to be to put pressure on the thoughtless and inefficient officers to perform their duty punctually in the public interest, but a tax authority cannot inflict penalty in thoughtless or routine manner. The legislature may create an offence of a strict liability where mens rea is wholly or partly not necessary. The question whether the offence involves the existence of mens rea as an essential element of it or whether the statute dispenses with it and creates strict liability, are questions which have to be answered on a true construction of the statute.

6. The Apex Court in Hindustan Steel Ltd. v. State of Orissa (1973) 83 ITR 26 has observed that an order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding and penalty will 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 its obligation. The Apex Court further observed that penalty will not also be imposed merely because it is lawful to do so. The powers are to be exercised judiciously. The Apex Court held as follows :

'Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute.'

Thus, the penalty under section 272A(2)(c) cannot be levied in a routine manner. The discretion vested with the authority is to be exercised judiciously on consideration of all the relevant circumstances. A bona fide breach cannot lead to

a penalty under section 272A(2)(c).

7. In the instant case, though it is true that the ignorance of law is no excuse but still the prescribed authority was required to examine all the relevant facts and circumstances of the case and to ascertain if it was a deliberate or negligent or an inadvertent default. In case of negligence, it would be a sound exercise of discretion, to inflict minimum or nominal penalty but in case of inadvertent office mistake, it would not be a sound exercise of judicial or quasi judicial power to inflict a penalty on the head of the public office. In such cases, the tax authorities should also evolve a method of advising the head of office by way of notice or reminder providing an opportunity to comply with the provisions, the breach of which may lead to levy of penalty. If the head of office does not act even after such a notice, it will be open for the tax authorities to say that it was not a case of inadvertent mistake.

8. In view of the aforesaid, we answer the questions posed by the Tribunal as follows :

(i) As regards question Nos. 1 and 2, we are of the view that the Tribunal was justified in cancelling the penalty imposed under section 272A(2), though for different reasons as given in the preceding paras. Thus, the said questions are answered against the revenue and in favour of the respondent-head of office.

(ii) As regards question No. 3, we are unable to agree with the reasonings given by the Tribunal as stated in the preceding paras. Thus, the question is decided in favour of the revenue and against the respondent-head of office.

(iii) The questions No. 4 and 5 do not survive in view of the answer to question No. 3.

9. Accordingly, the reference stands answered as indicated above.