P.N. Sikand Vs. Commissioner of Income-tax, New Delhi

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Court : Delhi

Decided On : Apr-30-1980

Reported in : (1980)18CTR(Del)307; [1980]126ITR202(Delhi)

Judge : Leila Seth and; S. Ranganathan, JJ.

Acts : Income Tax Act, 1961 - Sections 139(1), 139(2), 139(7), 256(1), 271, 271(1)(A), 274 and 274(1)

Appeal No. : Income-tax Reference No. 109 of 1972

Appellant : P.N. Sikand;nathmul Girdharilal

Respondent : Commissioner of Income-tax, New Delhi;commissioner of Income-tax, New Delhi

Judgement :

Leila Seth, J.

1. These two matters have been referred to us at the instance of the assessed under s. 256(1) of the I.T. Act, 1961 (to be referred to in brief as 'the Act').

2. The point in issue in both these income-tax references is the same, though the questions have been worded differently.

3. The three questions referred for our opinion in Income-tax References No. 83 of 1972 are as follows :

'(1) Whether, on the facts and in the circumstances of the case, any proceedings for imposition of penalty could be taken for a default, if any in not furnishing the return under section 139(1) in the assessment proceedings under section 139(2)

(2) Whether, on the facts and in the circumstances of the case, onus to establish that failure to furnish the return was without (sic) reasonable cause within the meaning of section 271(1)(a), has been rightly placed by the Tribunal upon the assessed

(3) Whether, on the facts and in the circumstances of the case the Tribunal has correctly interpreted the expression 'the amount of tax payable' in section 271(1)(a)(i) to mean the tax payable on the date of final assessment ?'

4. In Income-tax Reference No. 109 of 1972, the question on which our opinion is sought is :

'Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the penalty under section 271(1)(a) could be levied for failure to file the return under section 139(1) even after the notice under section 139(2) had been issued by the Income-tax Officer and whether could it be said that with the issue of notice under section 139(2), the default committed under section 139(1) did not come to a close.'

5. The assessed in Income-tax Reference No. 83 of 1972 is Shri P. N. Sikand and the assessment year is 1963-64, the relevant accounting year ending on December 31, 1962. The return of income for the said assessment year should have been filed on or before June 30, 1963. On request, the time for filing the return was extended till September 30, 1963. However, the assessed did not file any return by that date.

6. The ITO, thereafter, issued a notice under s. 139(2) of the Act dated March 19, 1964, which was served on the assessed on March 25, 1964. This notice required the assessed to file a return within 30 days of receipt of the notice. In compliance, the assessed filed a return on March 30, 1964.

7. On completion of the assessment proceedings, the ITO issued a notice under s. 274(1) read with s. 271(1)(a) of the Act asking the assessed to within time. This notice was duly served on the assessed on January 17, 1968. The assessed did not furnish any Explanationn. However, the ITO gave the assessed another opportunity to represent his case on June 28, 1969. But even on that date no one appeared for the assessed nor was any reply filed.

8. In these circumstances, the ITO presumed that the assessed had no Explanationn to offer and imposed a penalty of Rs. 23, 473, i.e., 2 per cent of the tax for every month of the five months' delay.

9. On appeal, the AAC confirmed the penalty order passed by the ITO. On further appeal by the assessed, the Tribunal dismissed the appeal subject to the question of quantum, as the assessable income of the assessed had been reduced by the AAC. The Tribunal, thereforee, directed that penalty be levied at 2 per cent. per month for five months' delay calculated with reference to the tax on the income as finally determined.

10. In Income-tax Reference No. 109 of 1972, the assessed, M/s. Nathmal Girdhari Lal, is a firm carrying on business in the manufacture of buckets. The assessed had it file its return on or before June 30, 1963, with regard to the assessment year 1963-64. The assessed had applied for extension of time and the time for filing the return was extended till July 31, 1963.

11. On September 18, 1963, the ITO issued a notice under s. 139(2) of the Act. In accordance with this notice, the return had to be filed by October 28, 1963. But the assessed filed the return on February 22, 1965.

12. The ITO completed the assessment December 30, 1967, and initiated penalty proceedings for delay in the filing of the return. The notice under s. 274 read with s. 271(1)(a) was duly served but the assessed failed to file a reply. Thereafter, the ITO issued a reminder asking the assessed to attend on November 26, 1969. The assessed's counsel attended but imposed a penalty of Rs. 22,186. This was calculated at 2 per cent of the tax for every month of 19 months' delay, not exceeding in the

aggregate 50 per cent of the tax.

13. On appeal, as the income of the assessed was reduced by the AAC, he also reduced the penalty accordingly. The period default was also curtailed to 18 months as a month's extension had been by the ITO. The further appeal by the assessed to the Tribunal was dismissed as being without merit.

14. The main point urged on behalf of the assesseds is that with the issue of a notice under s. 139(2), the default under s. 139(1) ceases to exist. In other words, it is submitted that since there is only one return and this is filed, thereafter, in response to the notice under s. 139(2), there cannot be any default under the provisions of s. 139(1). In fact, learned counsel went so far as to suggest that, by exercising his discretion and issuing a notice under s. 139(2), the ITO has in effect condoned the delay which has already taken place under s. 139(1) of the Act. This contention is sought to be supported by the Provisions of s. 139(7), which provide, that if a return has been furnished under s. 139(2) then a return need not be furnished under s. 139(1). It is, thereforee, submitted by learned counsel that since there is only one return, one proceeding, there can be only one default, the earlier default having vanished.

15. We find it difficult to accept this contention. Under s. 139(1), there is an obligation on every person, whose total income is assessable to tax during the previous year, to furnish a return. This return is to be in the prescribed from and verified in the prescribed manner and filed within six months of the end of the provisions year or the June 30, whichever is later. The ITO, however, has been given a discretion to extend the period if an application is made.

16. Under s. 139(2), if the ITO is of the opinion, that a particular persons is assessable under the Act, then before the end of the relevant assessment year he can issue a notice requiring him to furnish within 30 days of the date of service, a return of income in the prescribed form and verified in the prescribed manner.

17. It is, thereforee, clear that ss. 139(1) and 139(2) deal with two different situations. The first imposes an obligation to file a return suo motu and the second to furnish a return in compliance with the notice under s. 139(2). It is true that in terms of s. 139(7), only one return is required to be filed, but that cannot have the effect of wiping out the earlier obligation to file the return suo motu under s. 139(1).

18. The default is for not filing the return in time. The period of default starts the moment the statutory period within which the return has to be filed is over and continues till the filling of the return or assessment, whichever is earlier. The issue of a notice under s. 139(2) cannot per se have the effect of wiping out the earlier period of default. This can be done only by expressly condoning the delay.

19. A similar view has been taken by two Benches of this court in CIT v. Hindustan industrial Corporation : [1972]86ITR657(Delhi) and in Shiv Shankar Lal v. CGT : [1974]94ITR269(Delhi) . In Hindustan Industrial Corporation's case, Prithvi Raj J., speaking for the court, has opined (p. 665).

'The plain language of sub-section (2) of section 139 cannot be strained to hold that the assessed was absolved of its statutory obligation from filing a return of its income voluntarily under section 139(1) and the default committed in not filing the return

cannot be taken note of for initiating proceedings for imposition of penalty and that the period of default shall cease from the date when the notice under section 139(2) issued by the Income-tax Officer to the assessed requiring it to furnish a return of its income within 30 days from the date of service of the notice.'

20. Learned counsel for the assessed suggested that the matter required recognised in view of the decision of the Patna High Court in Addl. CIT v. Bihar Textiles : [1975]100ITR253(Patna) , wherein it has been held that a default under s. 139(1) comes to an end or ceases after a notice under s. 139(2) has been served. After considering the matter carefully, we find ourselves unable to agree with this view.

21. Recently the Madras High Court in R. Lakshminarayana Reddiar v. CIT : [1980]121ITR767(Mad) has referred to the decisions of the various High Courts, especially that of the Patna High Court and differed from it. In fact, following the decision in CIT v. Indra and Co. , of as also the Andhra Pradesh and Gujarat High Courts in Mullapudi Venkatarayudu v. Union of India [1957] 99 ITR 448 (AP) and S. Balaram v. CIT : [1976]105ITR674(Guj) , it has held that the default under s. 139(1) is completely independent of the default under s. 139(2).

22. The only other decision, which needs to be referred to on this aspect, is in Addl. CIT v. Ramapratap Shankarlal : [1979]117ITR662(MP) . The Madhya Pradesh High Court dealing with this matter came to the conclusion that the period of default under s. 139(1) comes to an end when a notice is issued s. 139(2). Thereafter, the default, if any, is for noncompliance with s. 139(2) of the Act.

23. This does mean, as held in Addl. CIT v. Bihar Textiles : [1975]100ITR253(Patna) by the Patna High Court, that the default under s. 139(1) ceases; but that for the period prior to issue of the notice under s. 139(2), the default is for failure to file a voluntary return under s. 139(1) and thereafter under s. 139(2) till the return is filed or assessment is made, whichever is earlier.

24. Looking at the matter even from this view-point, it would appear to us that the ITO was entitled in I.T. Reference No. 83 of 1972 to consider the period of default under s. 139(1) of the Act as five months, i.e., from September 30, 1963, to March, 1964. The fact that a notice was issued under s. 139(2) on March 19, 1964, and a return was filed in compliance on March 30, 1964, would not have the effect of automatically condoning or wiping out this period of delay.

25. In I.T. Reference No. 109 of 1972, the time for filing the return under s. 139(1) had been extended up to July 31, 1963. Between July 31, 1963, and September, 1963, when the notice under s. 139(2) was issued there was a default under s. 139(1) of two months. Thereafter, from October, 1963, till February, 1965, there was a default of 16 months, under s. 139(2), the total default being 18 months. The issuance of the notice under s. 139(2) did not cancel the earlier delay under s. 139(1). There is also no question of double penalty for the same default as suggested for the assessed. The period of default has been split up as indicated above under the two subsections.

26. In this view of the matter, we decide question No. 1 in I.T. Reference No. 83 of 1972, and the question in I.T. Reference No. 109 of 1972, in the affirmative and in favor of the revenue.

27. Mr. Bishamber Lal, learned counsel for the assessed, in I.T. Reference No. 83 of

1972, next urged that the initial onus of establishing the lack of reasonable cause was on the I.T. authorities and this had not been properly discharged. He submitted that penalty proceedings being of a quasi criminal nature, it was for the revenue to establish the absence of reasonable cause. In this connection, he relied on a Full Bench decision of the Gujarat High Court in Addl. CIT v. I. M. Patel and Co. : [1977]107ITR214(Guj) and a decision of the Rajasthan High Court in CIT v. Rawat Singh and Sons . The Full Bench of the Gujarat High Court in the above-mentioned case has opined that 'failure without reasonable cause' to furnish the return in question is an ingredient of the offence and that s. 271(1)(a) provides for penalty only in cases where the assessed has acted dishonestly or in a contumacious manner or in deliberate defiance of law or in conscious disregard of its obligation. It has further held that the legal burden is on the department to establish prima facie that the assessed has acted without reasonable cause. Once this initial burden which is slight, is discharged, it is for the assessed to show that he had a reasonable cause in falling to file the return within the time specified. The falsity of the Explanationn furnished by the assessed is not sufficient to establish the imposition of penalty.

28. In Rawat Singh and sons' case , the Rajasthan High Court also held that penalty under s. 271 of the Act could be imposed only if there was a deliberate acting in defiance of law or contumacious or dishonest conduct. The facts in that case were that the assessed had, on an application, been allowed to file its return for the assessment year 1965-66, by November 15, 1965. However, an incomplete return was filed on December 21, 1965, and subsequently, a full return was filed on May 19, 1966. Penalty proceedings were initiated under s. 271(1)(a) and, in reply to the notice, the assessed submitted, inter alia, that he had applied for an extension of time up to April 30, 1966. Since no proof of this was placed before the ITO, nor was there any communication granting an extension of the return. On appeal before the AAC, the assessed filed the copy of the application as also the receipt number. The AAC was of the view that, in the absence of any negative reply from the department, the assessed was entitled to reasonably assume that the request for time had been granted. He, thereforee, quashed the penalty. The Tribunal confirmed the finding and held that the assessed's conduct was not contumacious or dishonest nor had he acted deliberately in defiance of law. In these circumstances, the High Court rejected the application for reference as it held that there was no question of misdirection or wrong approach by the Tribunal.

29. In the present case, there are a number of factors which would indicate that there has been a deliberate defiance of law or a conscious disregard of its obligation by the assessed. The assessed 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 September 30, 1963, which was granted. He did not make any further request for time. In two of the earlier years he had also field returns rather late. He did not reply to the show-cause notice under s. 274/271(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 assessed had no reasonable cause for filing the return late. The conduct of the assessed clearly indicates that he was conscious of his obligation and acted in total disregard of it. In the facts and circumstances of the case, the slight initial onus had been discharged by the department and it was for the assessed to show that he had reasonable cause for filing the return late. This he failed to do.

30. On the result, we answer question No. 2 in I.T. Reference No. 83 of 1972, in the affirmative and in favor of the revenue.

31. Question No. 3 in I.T. Reference No. 83 of 1972 is not pressed by the learned counsel for the assessed in view of the retrospective amendment of the section subsequent to the decision of the Supreme Court in CIT v. Vegetable Products Ltd. : [1973]88ITR192(SC) .

32. As the other question have been answered in favor of the revenue, it will be entitled to one set of costs in I.T. Reference No. 83 of 1972. Counsel's fee Rs. 300.