**J.P. Sharma and Sons Vs. Commissioner of Income-tax**

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**Court** : Rajasthan

**Decided On :** Jan-03-1984

**Reported in** : [1985]151ITR138(Raj)

**Judge** : Dwarka Prasad and; Kanta Bhatnagar, JJ.

**Acts** : Income Tax Act, 1961 - Sections 271(1), 273, 274(1) and 275; Constitution of India - Article 226; Indian Income Tax Act, 1922 - Sections 18A

**Appeal No.** : D.B. Civil Income-tax Reference No. 3 of 1974

**Appellant** : J.P. Sharma and Sons

**Respondent** : Commissioner of Income-tax

**Advocate for Def.** : J.P. Joshi, Adv.

**Advocate for Pet/Ap.** : S.L. Choudhary and; S.K. Kakkar, Advs.

**Judgement** :

Dwarka Prasad, J.

1. The Income-tax Appellate Tribunal, Jaipur Bench, Jaipur, has referred the following two questions to this court for its opinion, by its order dated June 30, 1973 :

' 1. Whether, on the facts and in the circumstances of the case, the notices issued to the assessee under Sections 273 and 271(1)(a) at the time of assessment whose further proceedings were stayed on the request of the assessee were valid notices when no subsequent opportunity was allowed to the assessee of being heard before imposition of the penalties ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in setting aside the order of the Appellate Assistant Commissioner ?'

2. The assessee is a registered firm and its return of income for the assessment year 1959-60 was due on January 20, 1960, in accordance with a notice under Section 22(2) of the Indian I.T. Act, 1922 (hereinafter referred to as the ' 1922 Act '), which was in force at the relevant time. The assessee did not file its return of income for the aforesaid assessment year within time. But the return was filed on December 30, 1961, declaring a loss of Rs. 26,276 and the assessment was completed on March 10, 1964. At the time of completion of the assessment, the ITO issued notices under Sections 271(1)(a) and 273 of the I.T. Act, 1961 (hereinafter called the ' 1961 Act'), calling upon the assessee-firm to show cause why penalty should not be levied upon it

for its failure to file the return of income within time and failure to furnish an estimate of its income and to pay advance tax in accordance with the provisions of Section 18A of the 1922 Act. On receipt of the said notice, the assessee filed a reply on March 23, 1964, stating that the asses-see-firm was filing an appeal against the order of assessment and requesting the ITO to keep in abeyance the penalty proceedings until the decision of the appeal.

3. As according to the provisions of Section 275 of the 1961 Act, proceedings for imposition of penalty would have become barred by limitation by March 10, 1966, the ITO issued fresh notices to the assessee on September 8, 1965, calling upon it to explain why penalties under Sections 271(1)(a) and 273 be not imposed. But the notice, which was sent by registered post, was returned unserved with the remark 'not known'. Then, on October 20, 1965, the ITO again issued a notice to the assessee-firm. This time the notice was sent under a certificate of posting. On the failure of the assessee-firm to appear before the ITO, he proceeded to impose penalty upon the assessee-firm in the sum of Rs. 48,574 under Section 271(1)(a) and Rs. 8,450 under Section 273(b) of the 1961 Act, by orders dated March 5, 1966.

4. The assessee filed appeals against the orders imposing penalties upon it and the said appeals were allowed by the AAC by his order dated July 8, 1969, on the ground that the orders passed by the ITO imposing penalties were vitiated on account of non-observance of the provisions of Section 274(1) of the 1961 Act. The AAC remanded the matter to the ITO with a direction to complete the penalty proceedings after giving the assessee an adequate opportunity of hearing, so as to enable the assessee-firm to put forward the facts and circumstances leading to the defaults for which penalties were imposed and also to plead justification for such defaults.

5. The ITO, A-Ward, Sri Ganganagar, filed an appeal against the aforesaid order passed by the AAC before the Income-tax Appellate Tribunal, Jaipur Bench, Jaipur (hereinafter called 'the Tribunal'), on the ground that the AAC had no jurisdiction' to set aside the order imposing penalty upon the assessee. The assessee-firm filed cross-objections on the ground that the AAC having held that the levy of penalties by the ITO was illegal as the assessee was not given a reasonable opportunity of hearing by the ITO, the order imposing penalties should have been cancelled instead of being set aside and the case being remanded for fresh enquiry and disposal to the ITO.

6. The Tribunal came to the conclusion that the notice given by the ITO under Section 274(1) at the time of completion of the assessment proceedings was duly served on March 19, 1964, but at that time the assessee-firm did not choose to offer any explanation regarding the defaults and merely prayed that the penalty proceedings be kept in abeyance until the decision of the appeal arising out of the assessment order. As such, it was held that the order imposing the penalties passed by the ITO was not vitiated for non-observance of the mandatory provisions of Section 274(1) of the 1961 Act. However, the Tribunal felt that a reasonable opportunity of hearing should be afforded to the assessee in respect of imposition of penalties and so while accepting the appeal and setting aside the order passed by the AAC and remanding the matter to him by its order dated October 30, 1971, the Tribunal gave the following directions :

' It is necessary that these contentions of the assessee are considered at the proper stage and for this purpose, we would restore the appeals to the file of the Appellate Assistant Commissioner and direct him to dispose of them afresh, after hearing the

assessee on the merits of the contentions with regard to the reasonable cause which prevented the assessee from filing the return within time and the sufficient cause for not filing the estimate under Section 18A(3). ' (now Section 212).

7. The assessee-firm submitted a reference application before the Tribunal requiring it to draw up a statement of the case and refer questions of law arising out of its order dated October 30, 1971, to this court for its opinion and that is how the questions mentioned above have come up before us.

8. Having heard the learned counsels for the parties, we are of the view that in the circumstances of this case when the Tribunal has directed the AAC to afford full opportunity of hearing to the assessee-firm and to consider all the contentions of the assessee with regard to the reasonableness or sufficiency of the cause which prevented the assessee from filing the return within time and for not filing the estimate under Section 18A(3) of the 1922 Act, it would be wholly unnecessary for us to answer the questionswhich have been referred to this court. There is no doubt and there cannot possibly be any dispute between the parties on the question that the notices issued by the ITO under Sections 273 and 271(1)(a) of the 1961 Act to the assessee at the time of completion of the assessment proceedings were duly served upon the assessee as is evident from the reply of the assessee dated March 23, 1964. However, the question would still remain that when the ITO did not proceed with the penalty proceedings after the receipt of the letter of the assessee dated March 23, 1964, and by his conduct he appears to have acceded to the request of the assessee to keep the penalty proceedings in abeyance, then it was incumbent upon him to inform the assessee about the date of hearing in case, subsequently, the ITO thought it proper to proceed further with the penalty proceedings, in view of the time-limit provided in Section 275. Section 274(1) requires that the assessee should be given a hearing or at least a reasonable opportunity of hearing before an order imposing penalty is passed. However, as in the present case, the Tribunal has given directions to the AAC to afford the assessee-firm full opportunity of hearing and to plead justification or sufficient cause for the defaults, it appears to be wholly unnecessary for us to go into the question whether the Tribunal was justified in setting aside the order of the AAC. The purpose and intent of the provisions of Section 274(1) are that the assessee should have full opportunity of hearing before penalty is levied upon him. As the Tribunal has ensured that the assessee shall be afforded a reasonable opportunity of hearing by the AAC and has given specific directions to him in that respect, the requirement of Section 274(1) would be substantially fulfilled in the present case. In this view of the matter, the decision of the question as to whether full opportunity of hearing was not allowed to the assessee by the ITO while imposing a penalty has become merely academic, as now the assessee is going to be provided with a reasonable opportunity of hearing by the AAC in accordance with the directions given by the Tribunal by its order dated October 30, 1971. Thus, the assessee shall now be entitled to put forward the facts and circumstances which prevented it from filing the return within time and from filing the estimate under Section 18A(3) of the 1922 Act, as the AAC has been directed to hear the assessee on the merits of the contentions in respect of defaults, for which penalties are sought to be imposed upon it. In view of the aforesaid circumstances, we do not consider it necessary to answer the questions referred to us as the order passed by the Tribunal affords adequate relief to the assessee-firm.

9. The reference appears to have been sought for by the assessee in the present case on account of conflicting views expressed by the various High Courts regarding the

question as to whether the provisions of Section 275 would operate as a bar or not. But the conflict has now been set at rest by thedecision of their Lordships of the Supreme Court in CIT v. National Taj Traders [1980] 121 ITR 535 and it has been held that the principle that a fiscal statute should be construed strictly is applicable only to taxing provisions such as a charging provision or a provision imposing penalty and not to those parts of the statute which contain machinery provisions. Their Lordships of the Supreme Court have approved the view taken by the Bombay High Court in CIT v. Kishoresinh Kalyansinh Solanki : [1960]39ITR522(Bom) . That decision was followed by the Gujarat High Court in Vasani and Co. v. CIT : [1978]112ITR819(Guj) and by the Calcutta High Court in Bhagirathi Devi Jalan v. CIT : [1978]112ITR534(Cal) and the Madhya Pradesh High Court in Mohd. Shaft Khan v. CWT : [1983]144ITR489(MP) . On the other hand, the decision of the Assam High Court in CIT v. Sabitri Devi Agarwalla has been overruled by their Lordships of the Supreme Court in National Taj Traders' case [ 1980] 121 ITR 535. The decision of the Kerala High Court in Addl. CIT v. Panicker : [1974]97ITR525(Ker) and of the Allahabad High Court in CIT v. Ram Baran Ram Nath : [1976]104ITR691(All) and CIT v. Bhudar Singk & Sons : [1983]143ITR322(All) and of the Andhra Pradesh High Court in Addl. CIT v. N.V. Ganapathi Rao : [1978]115ITR277(AP) can no longer be held to be good law, in view of the decision of their Lordships of the Supreme Court in National Taj Traders' case [1980] 121 ITR 535.

10. Thus, it is now firmly established that the bar created by the provisions of Section 275 of the 1961 Act refers only to the initial order and if an order of assessment is passed on account of the direction by a higher authority in appeal or revision or on account of an answer given in a reference by the High Court or on account of the order of a High Court in exercise of original jurisdiction under Article 226 of the Constitution, then the time-limit laid down in Section 275 will not apply. In view of the conflict of decisions of different High Courts prevailing at the time when the reference was made, it might have been thought that the bar of two years provided under Section 275 may be applicable to the present case as well. But now the legal position in this respect has been amply clarified and the conflict has been set at rest by the decision of their Lordships of the Supreme Court in National Taj Traders' case [1980] 121 ITR 535 wherein the decision of Bombay High Court in Kishoresinh Kalyansinh Solanki's case : [1960]39ITR522(Bom) has been approved and now there can be no doubt that the limitation provided in Section 275 applies only to the first order and the said time-limit would not apply to orders passed under directions of higher authorities as mentioned above.

11. We, therefore, send the case back to the Income-tax Appellate Tribunal, Jaipur Bench, Jaipur, so that the order of the Tribunal dated October 30, 1971, may now be complied with.