

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,

NAGPUR BENCH : NAGPUR

Income Tax Reference No. 153 of 1984

Applicant : M/s R. B. Shreeram Durgaprasad, Tumsar

versus

Respondent : The Commissioner of Income Tax,
Vidarbha and Marathwada, nagpur

Mr M. V. Chakranarayan, Official Liquidator and Mr
A. G. Pimperkhede, Chartered Accountant for applicant

Mr Anand Parchure, Advocate for respondent

**Coram : B. P. Dharmadhikari And
V. M. Deshpande, JJ**

Dated : 24th November 2015

Oral Judgment (Per B. P. Dharmadhikari, J)

1. Following two questions are referred to this Court by the
Income Tax Appellate Tribunal under Section 256 (1) of the Income Tax
Act:-

(1) Whether on the facts and in the circumstances of the case, the re-assessment order for assessment year 1959-60 dated 18.3.1970 was barred by the period of limitation ?

(2) Whether on the facts and in the circumstances of the case and having regard to the form, content and language of the show-cause notices received by the assessee, the order of the Inspecting Assistant Commissioner imposing the penalty on the assessee was illegal and without jurisdiction ?

2. We have heard Official Liquidator as the assessee is already ordered to be wound up. Official Liquidator has taken assistance of panel Chartered Accountant M/s A. G. Pimperkhede & Company. We have heard Mr A. G. Pimperkhede, Chartered Accountant and perused brief note submitted by him along with photo copies of precedents.

3. Mr Anand Parchure, learned counsel for respondent submits that basic facts leading to the Reference are not in dispute. The Central Excise Authorities had carried out searches at various premises including the premises of the assessee Company and its directors and share-holders in August and September 1963 and they had seized a larger number of books of accounts and documents. The seized documents revealed that the

assessee had under-assessed its income or it had escaped assessment. For example, it was noticed that the assessee had adopted, at the stage of export of manganese ore, the practice commonly described as under-invoicing and had thereby entered in the books of accounts a smaller amount of profits than the real profits. Because of this, a concealed income was discovered and for assessment years 1953-54 to 1958-59, a notice was issued under Section 148 read with Section 147 (a) of the Income Tax Act, 1951. He points out that this notice dated 25.1.1965 was served upon assessee in September 1965 and, therefore, the period of limitation of four years as stipulated under Section 153 (2) (a) of the Income Tax Act, 1961 then in force, expired on 31.3.1970. The assessment order came to be passed on 18.3.1970.

4. Insofar as second question is concerned, he points out that the Reference was necessitated in the light of argument advanced before the ITAT by the respective counsel or assessee's representatives. He invited our attention to the finding of the Tribunal that clause (c) of Section 271 (1) relates to the various defaults as also "concealment of income", the use of word "etc" becomes redundant. The Tribunal has further considered whether the use of the disjunctive "or" in the notices or communications issued by the Department gives rise to an ambiguity. He, therefore, states

that altogether different complexion is now sought to be placed on question no. 2, as referred By pointing out various precedents which deal with technical aspects like recording a satisfaction on concealment etc. He urges that in present matter, ITAT has correctly found that if argument of assessee is accepted, it would lead to absurdity. He also by way of abundant precaution invites attention to the provisions of Section 275 (1) (a) of the Income Tax Act to point out that order imposing penalty passed on 24.2.1972 is within one year of adjudication of appeal by CIT. The appeal was adjudicated on 2.3.1971 and as such, the order is within limitation.

5. Learned Chartered Accountant and Official Liquidator have mainly relied upon a written note tendered to this Court. In written note, it is firstly contended that the Reference before this Court is in relation to assessment year 1959-60 when the provisions of Income Tax Act, 1922 only were in force. As such, the action taken is without jurisdiction. It is further pointed out that in terms of Section 153 (2) of the Income Tax Act, 1961 the re-assessment order after issuance of notice of re-opening dated **25.1.1965** has been passed beyond limitation.

6. Without prejudice to this contention, our attention has also been invited to the provisions of Section 275 (1) (a) to urge that against reassessment order dated 18.3.1970, on 24.2.1972 a further appeal before

the ITAT was very much pending and as such during its pendency, penalty proceedings could not have been initiated and no penalty could have been inflicted. The contention is, thus initiation as also passing of order is premature and, therefore, the form contained and language of so-called notice which overlooked these aspects, clearly show that the penalty order is unsustainable.

7. Provisions of Section 297 (2) (d)(ii) of 1961 Act stipulate that any income chargeable to tax had escaped assessment within the meaning of that expression in section 147 and no proceedings under section 34 of the repealed Act i.e. 1922 Act, in respect of any such income are pending at the commencement of this Act, a notice under section 148 of the new Act may, subject to the provisions contained in section 149 or section 150, be issued with respect to that assessment year and all the provisions of the 1961 Act shall apply accordingly. Issuance of such notice has been made subject to the provisions of Section 149 or Section 150 of 1961 Act.

8. Provisions of Section 149 of the Income Tax Act, 1961 prescribe a limitation of six years at the relevant time. Accordingly, it is not in dispute that the issuance of notice dated 12.1.1965 is within six years of assessment year 1959-60. But the question referred to is about the order of re-assessment dated 18.3.1970. We find that the provisions of Section 153

(2) at the relevant time prescribed limitation of four years from the end of assessment year in which notice under Section 148 of the Income Tax Act, 1961 is served upon assessee. Here, though notice is dated 25.1.1965, admittedly, it is served on assessee in September 1965 i.e. in financial year 1965-66 which expired on 31.3.1966. The assessment year for the purposes of Section 153 (2) (a) in present facts, therefore, shall be 1965-66 only and the order has been passed on 18.3.1970 i.e. before 31.3.1970. It is, therefore, within the stipulated time limit of four years. As such, it cannot be said that it is barred by limitation. Question No. (1) is answered accordingly in the negative i.e. in favour of the Department.

9. The provisions of Section 275 (1) (a) of the Act need to be looked into for considering the answer to second question. It is provided that no order imposing a penalty shall be passed where the assessment order is subject to appeal to the Commissioner (Appeals) or to further appeal to the Appellate Tribunal, after the expiry of period of two years from the end of financial year in which the proceedings, in the course of which action for imposition of penalty has been initiated, are completed or six months from the end of the month in which the order of the Appellate Assistant Commissioner or the Appellate Tribunal is received by the Commissioner, whichever period expires later. In the present facts, it is not in dispute that

against the assessment order dated 18.3.1970, the assessee had filed an appeal and the Appellate Assistant Commissioner of Income Tax has decided that appeal on 2nd March 1971. The order of penalty has been passed on 24.2.1972. However, against this adjudication by 1st Appellate Authority, assessee had filed further appeal and that appeal before the ITAT was pending till 26.3.1974. These facts are not in dispute.

10. To point out the effect of adjudication of penalty under Section 271 (1) (c) before adjudication by ITAT, the assessee invited our attention to the fact that addition of Rs. 10 lacs in assessment year 1959-60 by assessing officer was upheld by 1st Appellate Authority in its order dated 2.3.1971. This addition was also a foundation for penalty proceedings and assessee pleaded that it is not a concealed income before the Authority in penalty proceedings. Though the Authority did not accept it, later on the ITAT vide its order dated 26.3.1974 deleted that addition. With the result the submission is, had the penalty imposing authority awaited outcome of further appeal to ITAT, as per scheme of Section 275 (a), the penalty on amount of Rs. 10 lacs could not have been levied. It is contended that thus, the notices issued for initiating penalty proceedings and the order dated 24.2.1972 are premature.

11. With reference to various precedents placed on record, learned

Chartered Accountant invited our attention to the order imposing penalty to show that in paragraph 6, it has been observed that the I.T.O. has in its order for the assessment year 1954-55 given specific instances of suppression of receipts. Absence of such finding in addition to assessment year 1959-60, was brushed aside by pointing out the specific instances which were relevant for the assessment year 1954-55. The grievance about addition of Rs. 10 lacs has also been similarly overlooked in paragraph 9 of the penalty order.

12. We have perused paragraphs 6, 9 and 10 of the penalty order. In the light of question referred to us, we have to appreciate the argument as advanced. However, we note that learned counsel for the Department has attempted to show that as penalty order was passed for several years, concealment in one of the assessment years has been referred to by way of illustration. He submitted that as finding of concealment was maintained by 1st Appellate Authority on 2.3.1971 and was only partly set aside by ITAT on 26.3.1974, contention that penalty order does not specifically record any finding about concealment, is misconceived.

13. The language of Section 275 (1) (a) noted supra clearly shows that the order imposing penalty cannot be passed if the appeal against basic order of assessment is pending before the Competent superior

Authority. Here, on 24.2.1972 though 1st Appellate Authority had disposed of the appeal, further appeal of assessee before the ITAT was very much pending. The order imposing penalty, therefore, appears to be premature and, therefore, illegal and without jurisdiction. The notices for initiation of those proceedings are, dated 12.1.1972, 3.2.1972 and 27.9.1972 i.e. during the pendency of appeal before the ITAT. Essential ingredients of Section 275 (1) are clearly not in contemplation of notice issuing authority on these dates. The form or language of these notices shows clear non-application of mind in this respect. It is obvious that such notices initiating the penalty proceedings could not have been issued before 26.3.1974.

14. In this situation, we answer question no. 2 in favour of assessee i.e. against the Department.

15. Accordingly, reference proceedings are disposed of. No costs. Needless to mention that Income Tax Department is free to initiate penalty proceedings afresh, if it is still open and as per law.

V. M. DESHPANDE, J

B. P. DHARMADHIKARI, J

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