

ORDER SHEET

ITA NO.76 OF 2009
IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME-TAX)
ORIGINAL SIDE

C.I.T., CENTRAL-III, KOLKATA
Versus
NARAYANI & SONS (P) LTD.

BEFORE:

The Hon'ble JUSTICE GIRISH CHANDRA GUPTA
The Hon'ble JUSTICE ARINDAM SINHA

Date : 28th July, 2016.

MD.NIZAMUDDIN, ADVOCATE FOR APPELLANT
MR.J.P.KHAITAN, SR.ADVOCATE, MRS.SWAPNA DAS, MR.SIDDHARTH DAS, ADVOCATES FOR RESPONDENT

The Court: The subject matter of challenge is a judgment and order dated 7th November, 2008 passed by the Income Tax Appellate Tribunal, "A" Bench, Kolkata in ITA No. 1170 (Kol.) of 2008 pertaining to the assessment year 2004-05 by which the learned Tribunal dismissed an appeal preferred by the revenue. The aggrieved revenue has come up in appeal. The following question of law was formulated on 20th April, 2010.

"Whether on the facts and in the circumstances of the case the learned Tribunal has erred in law in dismissing the Appeal of the revenue by disregarding that the initiation of penalty proceeding under Section 271D of the Income Tax Act, 1961, is not related to the Assessment proceedings and it can be initiated at any time?"

Md. Nizamuddin, learned advocate appearing in support of the appeal, however, submitted that the question no.(ii) originally suggested is more on point. He, therefore, prayed for the question no.(ii) being substituted and for hearing of the appeal on that question.

Mr. Khaitan did not object. Therefore, the above question of law is substituted by the following question.

"(ii) Whether on the facts and in the circumstances of the case the Ld. Tribunal has erred in law in upholding the order of the Commissioner of Income Tax (Appeals) in view of Section 271D (2) read with Section 275(1) (c) of the Income Tax Act, 1961, by holding that the order of penalty was passed out of time taking into consideration the limitation period of six months from the date of issuance of notice by the Assessing Officer i.e. from 26.12.06 which was not pursued and by disregarding the notice dated 26.7.07 issued by the Addl. Commissioner of Income Tax who is the competent authority to initiate the penalty proceeding?"

The facts and circumstances of the case are as follows:-

The assessment was completed on 26th December, 2006 under section 153C/143(3) of the Income Tax Act. On 26th December, 2006 itself, the assessing officer who in this case was an Assistant Commissioner of Income Tax, issued a notice for imposition of penalty under section 271D(1) for violation of sections 269SS of the Income Tax Act during the assessment year 2004-05. The contents of the notice issued by him are as follows:-

"It has been found that you have been received cash of Rs.30,00,000/- above Rs.20,000/- at a time from a single person in the F.Yr.2002-03 relevant to A.Yr.2003-04. This is in violation to the provision U/s.269SS and attracts penalty U/s.271D(1).

Therefore you are required to explain why the penalty U/s.271D(1) of the I.T.Act should not be imposed against you. Your reply must reach this office 19th February, 2007."

The assessee replied stating, inter alia that there was no violation of section 269SS because the assessee had neither accepted any loan nor did the assessee accept any deposit of money. The assessing officer thereafter by a letter dated 27th February, 2007 referred the matter to the Additional Commissioner of Income Tax for necessary action.

The Additional Commissioner of Income Tax issued a fresh notice dated 26th July, 2007 to the assessee, the contents whereof are as follows:-

"It is noticed that during the previous year 2003-04 pertaining to the Asstt. Year- 2004-05 you have received share application money amounting to Rs.30,00,000/- received from 22 persons, each of the persons paying exceeding Rs.20,000/- otherwise than by an account

payee cheque or bank draft. Thus, you have violated the provisions of Sec.269SS of the I.T.Act.

You are hereby requested to show cause why provisions of Sec. 271D would not be attracted and the penalty u/s.271D could not be imposed upon you.

Your reply is expected by 31-07-2007."

The Additional Commissioner was of the opinion that the share application money though cannot be treated as a loan it partakes the character of a deposit. He, therefore, was of the opinion that there has been a violation of section 269SS and as such levied a penalty of Rs.30 lakhs by his order dated 21st September, 2007. The assessee challenged the order in an appeal before the CIT(A) who by its order dated 27th March, 2008 held that the period of limitation commenced on 26th December, 2006 when notice under section 271(D) was issued by the assessing officer. Therefore, the order passed on 21st September, 2007 was hit by limitation. The revenue unsuccessfully challenged the order before the learned Tribunal and has now come up before this Court.

Md. Nizamuddin, learned advocate appearing in support of the appeal drew our attention to a judgment of the Kerala High Court in the case of Grihalakshmi Vision Vs. Additional Commissioner of Income Tax reported in (2015) 379 ITR 100 (Kerala), wherein the following views were taken:-

"Question to be considered is whether proceedings for levy of penalty, are initiated with the passing of the order of assessment by the Assessing Officer or whether such proceedings have commenced with the issuance of the notice issued by the Joint Commissioner. From the statutory provision, it is clear that the competent authority to levy penalty being the Joint Commissioner. Therefore, only the Joint Commissioner can initiate proceedings for levy of penalty. Such initiation of proceedings could not have been done by the Assessing Officer. The statement in the assessment order that the proceedings under section 271D and section 271E are initiated is inconsequential. On the other hand, if the assessment order is taken as the initiation of penalty proceedings, such initiation is by an authority who is incompetent and the proceedings thereafter would be proceedings without jurisdiction. If that be so, the initiation of the penalty proceedings is only with the issuance of the notice issued by the Joint Commissioner to the assessee to which he has filed his reply.

The only case of the assessee is that the period of limitation prescribed in section 271(1)(c) is reckoned from the date of the assessment order dated November 6, 2007, the penalty order passed by the Joint Commissioner on July 29, 2008 is beyond the time permitted in the above section. As we have already held, the initiation of the penalty proceedings is not by the Assessing Officer but by the Joint Commissioner and if that be so, the order levying penalty passed by the Joint Commissioner is within the time prescribed in section 275(1)(c)."

He, therefore, submitted that the views taken by the learned Tribunal should be reversed and the appeal should be allowed.

Mr. Khaitan, learned senior advocate, appearing for the assessee drew our attention to a judgment of the Rajasthan High Court in the case of CIT Vs Jitendra Singh Rathore reported in (2013) 352 ITR 327 (Rajasthan), wherein the following views were taken:-

"In the present case, the first show-cause notice for initiation of proceedings was issued by the Assessing Officer on March 25, 2003, and was served on the assessee on March 27, 2003. Obviously, the later period also expired on September 30, 2003 when six months expired from the end of the month in which the action for imposing the penalty was initiated. The order as passed by the Joint Commissioner of Income-tax for the penalty under section 271D on May 28, 2004 was clearly hit by the bar of limitation and has rightly been set aside in the orders impugned.

In view of the above, our answer to the formulated question of law is that even when the authority competent to impose penalty under section 271D was the Joint Commissioner, the period of limitation for the purpose of such penalty proceedings was not to be reckoned from the issue of the first show cause by the Joint Commissioner; but the period of limitation was to be reckoned from the date of issue of the first show cause for initiation of such penalty proceedings. For the purpose of present case, as observed hereinabove, for the proceedings having been initiated on March 25, 2003, the order passed by the Joint Commissioner under section 271D on May 28, 2004, was hit by the bar of limitation. The Commissioner of Income-tax (Appeals) and the Tribunal have, thus, not committed any error in setting aside the order of penalty."

Mr. Khaitan submitted that the aforesaid judgment was cited before the Kerala High Court but the Kerala High Court did not give any reasons as to why was the

view taken by Rajasthan High Court not acceptable to the Hon'ble Division Bench of the Kerala High Court.

We have considered the rival submissions advanced by the learned advocates appearing for the parties. Sub-section 2 of Section 271D provides that the jurisdiction of imposing penalty is vested in the Joint Commissioner. The Sub-section 2 provides as follows:-

"Any penalty imposable under sub-section (1) shall be imposed by the Joint Commissioner"

Section 274 lays down the procedure for imposition of penalty. Sub-section 1 of Section 274 provides for affording a reasonable opportunity of hearing to the assessee before an order imposing penalty is passed. Though Section 271D vests the jurisdiction of imposing penalty solely in the Joint Commissioner, it is silent as regards initiation of the proceedings. The question is, can such initiation of proceedings be made by the Assessing Officer? The Assessing Officer is the person, who is likely to come across the cases of concealment or violation of the provisions of law attracting penal provisions. Can the Assessing Officer, having come across a case of violation of law attracting penal provisions, issue a notice and in case he does so, would that be an act without jurisdiction ? This question has been answered by the Kerala High Court in the affirmative. A somewhat similar situation is contemplated or is bound to arise under Sub-Section 2 of Section 274 which provides as follows:-

"[(2) No order imposing the penalty under this Chapter shall be made -

(a) by the Income-tax Officer, where the penalty exceeds ten thousand rupees;

(b) by the Assistant Commissioner [or Deputy Commissioner], where the penalty exceeds twenty thousand rupees, except with the prior approval of the [Joint] Commissioner.]"

Prior to introduction of Tax Laws (Amendment) Act, 1975, Sub-Section 2 of Section 274 was as follows:-

"(2) Notwithstanding anything contained in clause (iii) of sub-section (1) of section 271, if in a case falling under clause (c) of that sub-section, the minimum penalty imposable exceeds a sum of rupees one thousand, the Income-tax Officer shall refer the case to the Inspecting Assistant Commissioner who shall, for the purpose, have all the powers conferred under this Chapter for the imposition of penalty."

A plain reading of Sub-Section 2 of Section 274, as it was, goes to show that before the said Act of 1975 was introduced, the Assessing Officer had jurisdiction to impose penalty not exceeding a sum of Rs.1000/-. A case involving penalty imposable exceeding a sum of Rs.1000/- was required to be referred by him to the Inspecting Assistant Commissioner, who had the jurisdiction to impose penalty exceeding a sum of Rs.1000/-. Question arose whether in a case involving penalty imposable exceeding a sum of Rs.1000/-, the Assessing Officer could initiate the proceedings by issuing a notice. That question was answered by the Supreme Court in the affirmative. Their Lordships in the case of D.M. Manasvi vs. C.I.T., Gujarat, reported in [1972] 86 ITR 557, held as follows:-

" We are also not impressed by the argument advanced on behalf of the appellant that the proceedings for the imposition of penalty were initiated not by the Income-tax Officer but by the Inspecting Assistant Commissioner when the matter had been referred to him under section 274(2) of the Act. The proceedings for the imposition of penalty in terms of sub-section (1) of section 271 have necessarily to be initiated either by the Income-tax Officer or by the Appellate Assistant Commissioner. The fact that the Income-tax Officer has to refer the case to the Inspecting Assistant Commissioner if the minimum imposable penalty exceeds the sum of rupees on thousand in a case falling under clause (c) of sub-section (1) of section 271 would not show that the proceedings in such a case cannot be initiated by the Income-tax Officer. The Income-tax Officer in such an event can refer the case to the Inspecting Assistant Commissioner after initiating the proceedings. It would, indeed, be the satisfaction of the Income-tax Officer in the course of the assessment proceedings regarding the concealment of income which would constitute the basis and foundation of the proceedings for levy of penalty."

Applying the views expressed by the Apex Court it can be said that in a case falling under Section 271D the Assessing Officer is not precluded from initiating the proceedings by issuing a notice.

The views expressed by the Kerala High Court cannot be followed. Once it is realized that the proceedings were initiated on 26th December, 2006 when the notice was issued by the Assessing Officer, the period of limitation necessarily expired on 30th June, 2007 whereas the order imposing penalty was passed on 21st September, 2007. No elaborate reasoning is required to demonstrate that the order is hit by limitation.

In that view of the matter, the substituted question is answered in the negative and against the revenue.

The appeal is, therefore, dismissed.

Parties shall, however, bear their own costs.

(GIRISH CHANDRA GUPTA, J.)

(ARINDAM SINHA, J.)

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