Commissioner of Income Tax, Shillong

Vs

Assam Travels Shipping Service, Dibrugarh

Civil Appeal Nos. 2735-36 of 1977

(J. S. Verma, Dr. A. S. Anand JJ)

24.09.1992

ORDER

1. These appeals by special leave under Article 136 of the Constitution are against the judgment of the Gauhati High Court dated June 22, 1976 in Income Tax Reference No. 17 of 1974 deciding a common question of law relating to assessment years 1963-64 and 1964-65. The common question of law referred to the High Court for its decision under Section 256(1) of the Income Tax Act, 1961 was as under :

> "Whether on the facts and in the circumstances of the case the Tribunal was justified in law in upholding the order of the Appellate Assistant Commissioner cancelling the penalty orders of the Income Tax Officer under Section 271(1)(a) of the Income Tax Act, 1961 relating to the assessment years 1963-64 and 1964-65 on the ground that the penalty orders were illegal and not according to law ?"

2. The material facts are only a few. The assessee was a registered firm which committed default in submission of its return for the aforesaid assessment years, the delay being of 15 months in submission of the return for the assessment year 1963-64 and of 23 months in submission of the return for the assessment year 1964-65. The Income Tax Officer computed the penalty at the sum of Rs. 6,944 and Rs. 70,118 respectively for these two years. According to the department the penalty leviable on the assessee treating it as unregistered firm in accordance with Section 271(2) of the Act in such a situation was Rs. 65,700 and Rs. 93,564 respectively for those two years. Curiously, the assessee went up in appeal challenging imposition of even this penalty. The Appellate Assistant Commissioner, in appeal, came to the following conclusion :

> "In the present case for the assessment year 1963-64 the appellant was assessed on a total income of Rs. 2,89,620. The tax thereon in the status of URF comes to Rs. 2,19,035. Two per cent. of this comes to Rs. 4,380 per month. The delay in submission of the return is for a period of 15 months. The penalty imposable in this case therefore, should be Rs. 65,700 whereas the Income Tax Officer has imposed a penalty of Rs. 6,944. For the assessment year 1964-65 the appellant was assessed on a total income of Rs. 2,81,110. Tax thereon in the status of URF comes to Rs. 2,03,405. The penalty @ 2% of this comes to Rs. 4,068 per month. But the delay in submission of the return is for a period of 23 months. The penalty in this case, therefore, would be at Rs. 93,564 whereas the Income Tax Officer has imposed a penalty of Rs. 70,118 only. This is, therefore, clearly contrary to the provision of Section 271(1)(a)."

3. The Appellate Assistant Commissioner having reached the conclusion that the Income Tax Officer had committed this illegality, instead of taking the necessary proceedings in accordance with law for avoiding this loss of revenue made the order cancelling the entire penalty imposed by the Income Tax Officer. The department then went up in appeal to the Income Tax Appellate Tribunal. The Tribunal affirmed the finding of the Appellate Assistant Commissioner about the illegality committed by the Income Tax Officer in computing the penalty which was required to be imposed on the assessee and then it proceeded to say that it had no other alternative except to uphold the order of the Appellate Assistant Commissioner cancelling the penalty imposed by the Income Tax Officer which suffered from the illegality indicated. At the instance of the department the Tribunal referred the above-quoted question of law under Section 256(1) of the Act for the decision of the High Court. The High Court, by the impugned order has reaffirmed as correct the computation of penalty made by the Appellate Assistant Commissioner and the Tribunal indicating that the computation made by the Income Tax Officer was illegal and at much lower amount. The High Court after quoting extensively from the Tribunal's order while affirming its finding on the quantum of penalty required to be imposed on the assessee proceeded to take the view that the question of law referred to it for its decision did not cover the question of law which arose out of the Tribunal's order. The High Court stated thus :

> "The assessee was, therefore, liable to pay penalty under Section 271(1) of the Act. The penalty must be imposed within the minimum and maximum limits prescribed by Section 271(1)(a) read with sub-section (2) of Section 271. Sub-Section (2) cannot be detached from sub-section (1) of Section 271 while determining the quantum of penalty between the minimum and maximum limits prescribed. The statutory minimum and maximum limits of penalty imposable under Section 271 have to be observed by any authority imposing the penalty. In the instant case, the penalty was imposed contrary to the provisions of sub-section (2) of Section 271. That being so the order of the Income Tax Officer cannot be said to be in accordance with law and, therefore, it is not sustainable in law. The penalty imposable in both the assessment years was much higher that the penalty imposed by the Income Tax Officer.
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> It is not disputed before us that the Tribunal has no right to enhance the penalty. The question of law referred to us is also not to the effect whether the Tribunal was justified in not remanding the case to the Appellate Assistant Commissioner after setting aside the orders of the Income Tax Officer by upholding the order of the Appellate Assistant Commissioner cancelling the orders of penalty passed by the Income Tax Officer. The common question of law referred to us is Whether the Tribunal was justified in law in upholding the order of the Appellate Assistant Commissioner cancelling the penalty orders of the Income Tax Officer on the ground that the penalty orders were illegal and not according to law. There is no doubt, as discussed herein above, that the penalty orders passed by the Income Tax Officer were not in accordance with law and on that ground the penalty orders were not sustainable and the Appellate Assistant Commissioner apart from other grounds set aside the penalty orders on that ground also. That being so and in view of the facts and circumstances of the case, the Tribunal cannot be said to be unjustified in upholding the order of the Appellate Assistant Commissioner in setting aside the orders of the Income Tax Officer on the ground that the penalty orders passed by the Income Tax Officer were illegal and not according to law."

4. Learned counsel for the appellant submits, in our opinion, rightly that the High Court was in error in construing the question of law referred to it as not including the question of law which arose out of the Tribunal's order. The Appellate Assistant Commissioner as well as the Tribunal clearly held that the computation of penalty made by the Income Tax Officer was not in accordance with law and the correct computation of penalty was also made while taking that view. The conclusion clearly reached was that the computation of penalty had to be made in accordance with Section 271(1)(a) read with sub-section (2) of Section 271 of the Act. The correct figure arrived on that basis on the facts of this case was also indicated. On that conclusion the only question arising out of the Tribunal's order was whether the Tribunal had no other alternative except to dismiss the department's appeal and thereby affirm the order of the Appellate Assistant Commissioner cancelling even the lesser penalty imposed by the Income Tax Officer overlooking Section 271(2) of the Act. This question related to the power of the Tribunal in deciding the appeals before it.

5. Sub-section (1) of Section 254 is as under :

> "254.(1) The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit."

6. The expression "as it thinks fit" is wide enough to include the power of remand to the authority competent to make the requisite order in accordance with law in such a case even though the Tribunal itself could not have made the order enhancing the amount of penalty. The power of the Appellate Assistant Commissioner under Section 251(1)(b) includes the power even to enhance the penalty subject to the requirement of sub-section (2) of Section 251 of reasonable opportunity of showing cause against such enhancement being given to the appellant assessee. This could have been done in the assessee's appeal itself filed in the present case. The power of the Tribunal to make an order of remand in such a situation is well settled. (Hukumchand Mills Ltd. v. CIT, (1967) 63 ITR 232 : (1967) 1 SCR 463)

7. This being the position in law the Tribunal was not justified in taking the view that it had no other alternative except to affirm the order of the Appellate Assistant Commissioner cancelling even the lesser penalty imposed by the Income Tax Officer. In view of Section 251(1)(b) of the Act it is also clear that the Appellate Assistant Commissioner was wrong in taking the view that he had no power to enhance the penalty in accordance with law on reaching the conclusion that the computation of penalty made by the Income Tax Officer was illegal, and that he could only cancel even the lesser penalty which had been imposed by the Income Tax Officer. It has now to be seen whether the question of law referred to the High Court under Section 256(1) of the Act covered this aspect.

8. Apart from the fact that the High Court is empowered to reframe a question of law arising out of the Tribunal's order in case the frame of the question is not proper. We have no doubt that the question of law even as framed was wide enough to include this aspect which arises out of the Tribunal's order leading to the reference made to the High Court. The real question of law arising out of the Tribunal's order was : Whether the Tribunal was justified in taking the view that it had no alternative except to uphold the order of the Appellate Assistant Commissioner cancelling the penalty imposed by the Income Tax Officer ? In substance the question of law referred meant whether the Tribunal was justified in taking the view that it had no power to remand the matter to the Appellate Assistant Commissioner for further enquiry and decision in accordance with law on the findings of fact recorded. The High Court was in error in taking the view that this aspect was not covered in the question of law referred to it.

9. Consequently, the impugned judgment of the High Court is set aside. The High Court should have answered the question of law referred to it in the negative stating that the Tribunal was not justified in upholding the order of the Appellate Assistant Commissioner and it should have remanded the matter to the Appellate Assistant Commissioner for proceeding to enhance the penalty as indicated, in accordance with law.

These appeals are allowed, accordingly. No costs.

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