

ANDHRA PRADESH HIGH COURT

Poorna Biscuit Factory

Vs

Commissioner of Income-Tax

(Kondaiah, C.J. Sriramulu, J.)

19.02.1971

JUDGMENT

Sriramulu, J.

1. At the instance of the assessee, the Income-tax Appellate Tribunal, under Section 256(1) of the Income-tax Act, 1961 (hereinafter referred to as "the Act"), referred the following two questions of law for our opinion :

1. Whether, on the facts and in the circumstances of the case, penalty is leviable under Section 271(1)(a) when the assessee filed a voluntary return of income within the time prescribed under Section 139(4) of the Act ?

2. Whether, on the facts and in the circumstances of the case, it is open to the Income-tax Officer to levy the penalty under Section 271(1)(a) at a lesser rate than 2% of the tax ?"

2. The material facts giving rise to the reference may briefly be stated: Under Section 139(1) of the Act the assessee had to file its return of income for the assessment year 1963-64 on or before September 30, 1963. The assessee did not file the return by September 30, 1963, but filed an application dated October 15, 1963, requesting the Income-tax Officer to extend time up to November 15, 1963, for filing the return. No order was passed on that application. The assessee filed the return on July 10, 1964. After completing the assessment, the Income-tax Officer issued notice under Section 271(1)(a) of the Act to show cause why penalty against it should not be levied for the late filing of the return. The assessee gave some explanation for not filing the return within the time allowed under Section 139(1) of the Act. The Income-tax Officer did not accept that explanation as a reasonable cause, which prevented it from filing the return in time, and accordingly levied penalty of Rs. 2,170 on the assessee under Section 271(1)(a) of the Act.

3. On appeal, the Appellate Assistant Commissioner reduced the penalty to Rs 2,129 and a further appeal to the Income-tax Appellate Tribunal ended in its dismissal. Hence this reference.

4. The learned counsel, Sri Dasaradharami Reddy, appearing for the assessee contended that, (1) when the assessee had voluntarily filed the return of income under Section 139(4) of the Act within the time allowed by that sub-section, the Income-tax Officer could not impose penalty at all, but he could only levy penal interest, and (2) if penalty was at all leviable, it was open to the Income-tax Officer to levy penalty at a rate lesser than 2% of the tax for every month during which the default continued, subject to a maximum of 50% of the tax.

5. The learned standing counsel, Sri P. Ramarao, appearing for the department, on the other hand, contended that the voluntary filing of the return under Section 139(4) of the Act did not absolve the assessee of its liability to pay penalty under Section 271(1)(a) of the Act and in a case where penalty is attracted the Income-tax Officer has no option except to levy penalty at the rate of 2% of the tax for every month of delay subject to a maximum 50% of the tax.

6. Under Section 139(1) of the Act every person whose total income exceeds the maximum, which is not chargeable to tax, is under a statutory duty to file his return of income within the time specified in the section or within the time extended by the Income-tax Officer, on an application filed by that person. If in the opinion of the Income-tax Officer a person has total income during the previous year, which is assessable to income-tax, he may issue notice to that person under Section 139(2) of the Act requiring him to file a return within 30 days from the date of service of notice or within the time extended by the Income-tax Officer on an application of that person. A person who fails to file a return of his income under Section 139(1) or under Section 139(2) of the Act, can file a voluntary return under Section 139(4) of the Act within the time specified therein. If a person files his return beyond the dates mentioned in Clauses (1) and (2) of Section 139, he shall be liable to pay penal interest at 9% per annum from the date specified therein up to the date of the filing of the return.

7. Section 271(1)(a) provides that, in the course of the assessment, if the Income-tax Officer or the Appellate Assistant Commissioner is satisfied that a person had without reasonable cause failed to furnish the return or failed to furnish the return within the time allowed under Section 139(1) or 139(2) of the Act, he may direct that such person shall pay by way of penalty in addition to the tax a sum equal to 2% of the tax for every month during which the default continued, but not exceeding in the aggregate 50% of the tax.

8. On a plain reading of the above sections it is clear that any person who fails to file a return or fails to file a return within the time allowed under Section 139(1) or fails to file it within the time allowed under Section 139(2) of the Act without reasonable cause is liable to pay penalty. There is no provision in the Act which shows that penalty is not attracted in a case where penal interest is levied for the delay in filing the return. If that was the intention of the legislature, we would have certainly found a provision in the Act to the effect that penalty is not leviable for late filing

of the return, where penal interest is levied for the delay.

9. The argument of the learned counsel, Sri Dasaradharami Reddy, was that Section 139 was a special provision and Section 271(1), a general provision. To a case to which those sections apply, special provision must prevail over the general provision and action should be taken under the special provision and not under the general provision. If the provisions are not interpreted in that manner, it will lead to an absurd result. A man who fails to file a return will pay penalty under Section 271(1)(a) of the Act, but not the penal interest. However, if that person chooses to file the return though beyond the time fixed under Section 139(1) or 139(2) of the Act, he has to pay, in addition to the penal interest, also penalty under Section 271(1)(a) of the Act. The taxpayer would be saved from such a situation if Section 271(1)(a) of the Act is interpreted to mean that penalty is leviable only in case of failure to file return and not for late filing of the return.

10. We are unable to accept this argument of the learned counsel. The argument that Section 271(1) of the Act is a general provision and Section 139 is a special provision and to a case to which both sections are attracted, only the special provision must be applied and not the general provision is, in our opinion, untenable. Section 139 of the Act deals with the filing of the returns and Section 271 deals with the consequences of non-filing or delayed filing of the return. Section 271 of the Act is not attracted unless there is a default under Section 139 of the Act. Both the sections operate in different fields. The other argument that in the case of delay in filing the return only interest can be levied and not penalty is also devoid of force, because there is no provision to that effect in the Act. There is no bar in the Act for the levy of penal interest as well as penalty for the late filing of the return.

11. In *K.P. Reddy v. Commissioner of Income-tax*, [1968] 68 ITR 638, 643 (AP) a Division Bench of this court, consisting of Jaganmohan Reddy C.J. (as he then was) and Samba-siva Rao J., held that:

"If any person does not file a return within the prescribed period, Section 28(1)(a) is immediately attracted and he will be liable for penalty in any proceedings which the Income-tax Officer may take to assess his income be they on a notice under Section 22(2) or under Section 34."

12. At page 645 in the report, Jaganmohan Reddy C.J. (as he then was), speaking for the court, observed :

"If proceedings are initiated, as was held already, then non-compliance with that provision has been made a specific ground for levying of penalty under Section 28(1)(a). It does not make any difference whether no return has been filed at all which gave rise to a notice under Section 22(2)

and/or proceedings under Section 34, or where a return has been filed beyond the time given in a notice under Section 22(1). In either of these cases the Income-tax Officer has jurisdiction to levy a penalty for not filing a return in time. If a return has been filed, not in compliance with a notice under Section 22(1), but after the expiry of the period prescribed in that notice, the mere fact that the return has not been accepted or that the assessee has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income does not preclude the Income-tax Officer from taking action under Section 28(1)(a), if he so chooses."

13. The scheme of the 1961 Act is that it is incumbent on every person, who has got assessable income to file his return of income under Section 139(1) of the Act. The 1961 Act has dispensed with the general notice, which was required to be issued under Section 22(1) of the Indian Income-tax Act, 1922. If in the opinion of the Income-tax Officer, a person has got assessable income, he may by notice require him to file a return of his income within 30 days from the date of service of such a notice. If that person still failed to furnish the return of his income in compliance with Section 139(2) of the Act, the law gives to that person a further opportunity to file the return within the time specified under Section 139(4) of the Act, so as to avoid the best judgment assessment being made under Section 144 of the Act. The mere fact that the law gives him a further chance to file a return under Section 139(4) does not absolve him from his liability to be penalised under Section, 271(1)(a) for the default he has already committed. The penalty is for failure, without reasonable cause, to file the return or for filing it beyond the time allowed under Section 139(1) or 139(2) of the Act. The penal interest is, however, levied as compensation to the Government for the interest that it would have earned had the return been filed in time and the assessment made on the basis of that return. As has already been stated, there is no bar to the levy of penalty in addition to the penal interest in a case, where the return is filed out of time. We are, therefore, unable to accept the contention of the learned counsel, Sri Dasaradharami Reddy, and accordingly answer question No. 1 in the affirmative and against the assessee.

14. We will then take up the second question. The argument of the learned counsel, Sri Dasaradharami Reddy, was that the legislature has used the word "may" in Section 271(1) of the Act and the word "may" means "shall have power". In this connection the learned counsel invited our attention to the difference between the language used in Section 7A(ii) and Section 29(3) of the Andhra Pradesh General Sales Tax Act where, in the former section, the word "shall" has been used and in the latter the words "shall have power to" were used. In *Vetcha Sreeramamurthy v. Income-tax Officer, Vizianagaram*¹, a Bench of this court considered the meaning of the words "may in his discretion", occurring in Section 45 of the Indian Income-tax Act, 1922. Referring to the meaning of those words given in Maxwell on the Interpretation of Statutes, 10th edition, at page 239, the following passage has been cited :

"Statutes which authorise persons to do acts for the benefit of others, or, as it is sometimes

said for the public good or the advancement of justice, have often given rise to controversy when conferring the authority in terms simply enabling and not mandatory. In enacting that they 'may' or 'shall, if they think fit,' or, 'shall have power', or that it shall be lawful' for them to do such acts, a statute appears to use the language of mere permission, but it has been so often decided as to have become an axiom that in such cases such expressions may have--to say the least--a compulsory force, and so would seem to be modified by judicial exposition."

15. Section 271(1)(a) of the Act is neither for the public good nor for the advancement of justice. In such a case the word "may" has to be understood as having no compulsory force. Therefore, the Income-tax Officer has got discretion to levy penalty under Section 271(1)(a) at 2% of the tax for every month of default or less.

16. The other argument advanced by the learned counsel was that in sub-Clauses (ii) and (iii) of Clause (c) of Section 271(1) both the minimum and maximum penalties have been fixed. The language used in Sub-clause (ii) of Clause (c) of Section 271(1) is, "a sum which shall not be less than 10%, but which shall not exceed 50% of the amount of tax". The language used in Sub-clause (iii) of Clause (c) of Section 271(1) is "a sum which shall not be less than, but which shall not exceed twice, the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished."

17. There is a difference between the language used in these sub-clauses and Sub-clause (i) of Clause (c) of Section 271(1), which reads as follows: "He may direct that such person shall pay by way of penalty...

(i) in the cases referred to in Clause (a) in addition to the amount of the tax, if any, payable by him, a sum equal to 2% of the tax for every month during which the default continued, but not exceeding in the aggregate 50% of the tax."

18. There is in our opinion, no force in this argument. In every penal statute, the word used is "may". By the use of the word "may" in penal sections the legislature contemplates levy of penalty, if the essential ingredients of that section are fulfilled, and in cases where such essential ingredients are not fulfilled, not to levy penalty. Therefore, the word "may" occurring in Section 271(1)(a) of the Act has been used with reference to the existence or otherwise of the circumstances justifying imposition of penalty and not in regard to the quantum of penalty that is to be imposed.

19. In Section 271(1)(c)(i) the words used are "a sum equal to 2% of the tax". A sum equal to means identical and nothing more nor less. Therefore, on a plain reading of the section, it is obvious to us that the Income-tax Officer has no option in the matter of quantum of penalty when

he comes to the conclusion that penalty is attracted. He has to levy penalty, at 2% of the tax for every month of default, subject, however, to the maximum of 50% of the tax in the aggregate. We find support for our view in Commissioner of Income-tax v. Venichand Maganlal, . We, therefore, reject the contention of the assessee and hold that when once the Income-tax Officer comes to the conclusion that the assessee's failure to file the return within the time allowed by Section 139(1) of the Act was without a reasonable excuse, penalty is attracted in respect of such a default under Section 271(1)(a), notwithstanding the fact that the assessee had filed a voluntary return under Section 139(4) within the time limit fixed thereunder. In such a case the Income-tax Officer has no option except to levy penalty at the rate of 2% of the tax for every month during which the default continued, subject to a maximum of 50% of the tax in the aggregate. Hence question No. 2 is answered in the negative and against the assessee. The assessee shall pay the costs of this reference to the Commissioner of Income-tax. Advocate's fee is Rs. 250.

Cases Referred.

1[1956] 30 ITR 252 (AP)