

CALCUTTA HIGH COURT

Khusiram Murarilal

Vs

Commissioner of Income-Tax

(Chakravartti, C.J.)

06.03.1953

JUDGMENT

Chakravartti, C.J.

1. This is a reference under Section 66(2) of the Income-tax Act, made by the Calcutta Bench of the Appellate Tribunal under the directions of this Court. Previously, the Tribunal had rejected the assessee's application for a reference in the view that no point of law arose out of the appellate order. The assessee is a registered firm and was assessed in that status. It appears that in the course of its assessment for the assessment year 1942-43, a notice under Section 22(4) of the Act was served upon it for the production of certain Sauda Khatas, Patan Bahis and Sahi Bahis for the Diwali year 1997-98. The assessee failed to comply with that notice and accordingly a penalty of Rs. 15,000 was imposed on it under the provisions of Section 28(1)(b) of the Act. The assessee's appeals against that imposition were successively dismissed by the Appellate Assistant Commissioner and the Appellate Tribunal. The grounds of appeal before the Appellate Tribunal appear to have been all grounds of fact. In the course of the argument, however, a point appears to have been taken that Section 28 of the Income-tax Act was not applicable to a registered firm at all, because a "person", as contemplated by Section 2(9) of the Act, was a physical person and not a notional person like a firm. The Appellate Tribunal rejected that argument in the view that the word "person", as defined in the Act, was not limited to physical persons but comprised persons of other kinds as well and, particularly with regard to registered firms, it pointed out that in clause (d) of the proviso to Section 28 itself, a specific reference had been made to a registered firm as a person liable to penalty. Thereupon the assessee required the Tribunal to refer to this Court certain questions of law, including the question as to the liability of a registered firm to penalty. That application, as I have already stated, was rejected. The assessee next moved this Court under Section 66(2) of the Act and it appears that for the first time in that application, it raised a question to the effect that no penalty could be legally imposed upon a registered firm, since a firm, if it was a registered firm, was not, as such, either assessable to, or liable to pay, any tax under the Income-tax Act. Dr. Sen Gupta, who had appeared at the hearing of the application, informed us that that was the principal question which he had urged before the Bench to which he

had applied for a Rule.

A Rule was issued and the Tribunal was asked to show cause why it should not state and refer to this Court a case with reference to the following question :-

"Whether on the facts and circumstances of the above mentioned case, the Tribunal was right in holding that the imposition of a penalty on the petitioner, a registered firm under Section 28(1)(b) of the Income-tax Act, was justified in law."As the question framed by the Bench which issued the Rule was undoubtedly a question of law, the Rule was, in due course, made absolute and it is that question which has since been referred. On behalf of the Commissioner of Income-tax, a preliminary objection was taken by Mr. Meyer. He contended that if the assessee attempted to raise a question that no penalty was leviable from a registered firm, because no income-tax or super-tax was payable by it as such, it could not be allowed to do so, since no such question arose out of the appellate order. I am entirely in agreement with Mr. Meyer in thinking that the question, as sought to be raised before this Court, cannot possibly be said to arise out of the appellate order. But at the same time I feel bound to say that when this Court framed the question at the hearing of the application under Section 66(2), it must have had in mind the question as sought to be raised to-day. I cannot imagine any Bench directing the Tribunal to refer a question as to whether a registered firm is a person, particularly after the Tribunal had declined to do so and given its reasons for the view taken by it. It appears from the application upon which the Rule was issued that the question as sought to be raised to-day was embodied in the very first ground taken by the assessee and, in those circumstances, it appears to me that whether or not the question really arises out of the appellate order, we are now bound to treat it as so arising. As I have said elsewhere, once this Court directs a case to be stated with reference to a particular question, it must be deemed to have held that the question did arise out of the appellate order and thereafter it cannot be open to the Bench finally hearing the reference to throw it out on the preliminary ground that the question did not arise at all. It is therefore necessary to consider the assessee's contention on its merits. The contention urged by Dr. Sen Gupta was simple. He referred to the terms of the charging section, viz., Section 28(1), and contended that, under that section, no one was liable to pay a penalty unless he was also liable to pay income-tax and it might also be super-tax. Since a registered firm was not itself assessed and since no income-tax or super-tax was payable by the firm itself, it followed, according to Dr. Sen Gupta, that no penalty could be charged on or levied from a registered firm. He did not overlook the fact that an attempt had been made by the Amendment Act of 1940 to remove the difficulty created by the concluding paragraph of Section 28(1), but in his submission, the amendment made by way of inserting a new clause, viz., clause (d), in the proviso to the section, had not achieved its object of making a registered firm chargeable to penalty. The basis of Dr. Sen Gupta's argument was as follows : The concluding paragraph of Section 28(1) of the Income-tax Act provides that if a person has done one or other of the things for which a penalty is chargeable, "such person shall pay by way of penalty in the case referred to in clause (a), in addition to the amount of the income-tax or super-tax, if any, payable by him, a sum not exceeding one and a half times that amount, and in the cases referred to in clauses (b) and (c), in addition to any tax payable by him, a sum not exceeding one and a half times the amount of the income-tax or super-tax, if any, which would have been avoided if the income as returned by such person had been accepted as the correct income." Dr. Sen Gupta's contention was that, under the section, a person was made liable to pay certain sums, computed by reference to the tax payable, in addition to "the amount of the income-tax and super-tax, if any, payable by him," in case the default was one coming under clause (a) of the section and "in addition to any tax payable by him" in cases coming under clauses (b) and (c). In all the three cases, however, the penalty was contemplated to be only "in

addition to" the amount of tax payable. According to Dr. Sen Gupta, it followed that if no income-tax or super-tax was payable by a person at all, he could not be made liable to pay a penalty under the section, because the latter liability was dependent on and linked with a liability to pay income-tax and it might also be super-tax. The words "if any" by which the expression "the amount of the income-tax and super-tax" is qualified, both at the beginning and at the end of the concluding paragraph of Section 28(1), were, according to Dr. Sen Gupta, limited to super-tax and was not intended to qualify the liability itself. Passing on to clause (d) of the proviso, Dr. Sen Gupta contended that clause sufficed only to quantify the amount of penalty in the case of a registered firm, but by reason of an obvious defect of draftsmanship, it fell short of fixing a liability for penalty on registered firms and making it leviable from them. Clause (d) of the proviso, so far as is material, provides that "when the person liable to penalty is a registered firm, or an unregistered firm treated under Section 23(5)(b) as a registered firm so that the amount of the income-tax and super-tax payable by the firm itself has not been determined, that amount shall be taken to be an amount equal to the tax which would have been payable by an unregistered firm on an income equal to the firm's total income and" etc. Dr. Sen Gupta's argument was that although the effect of this new clause, added to the proviso, was to equate an unregistered firm with a registered firm the equation did not proceed beyond the amount of penalty payable. In other words, the clause only laid down a rule of computation. It, however, failed to do the one thing needful which was to make the amount so computed payable by the registered firm. In support of his contention, Dr. Sen Gupta referred to the decision of the Bombay High Court in the case of *Commissioner of Income-tax, (Central) Bombay v. Nazir and Sons, Bombay*¹ particularly for an exposition of the concluding paragraph of Section 28(1), because his argument was that in spite of the addition of clause (d) in the proviso to the section the position created by the concluding paragraph of Section 28(1), had remained unaffected. The contention of Mr. Meyer who appears on behalf of the Commissioner of Income-tax was that the words "if any" did not qualify only "super-tax" but were intended to qualify the liability to tax itself. He pointed out clause (b) of the proviso to the section which lays down that the "penalty imposed upon a person when he has no income liable to tax, shall not exceed twenty five rupees." The significance of that clause of the proviso, Mr. Meyer contended, was that the Act clearly contemplated that there could be a penalty imposed upon an assessee who committed one or other of the defaults mentioned in Section 28, although he might not have had any assessable income at all. If that was so, a registered firm, like any other assessee, would be liable to pay penalty under the concluding paragraph of Section 28(1) itself, even though it might not be assessable to income-tax or super-tax and therefore it was not really necessary that clause (d), inserted in the proviso to the section by the Amendment Act of 1940 should re-affirm that liability or that should create a liability on the basis that none was formerly existent. The whole question to my mind depends upon the true scope and meaning of the words "if any", occurring both at the beginning and towards the end of the concluding paragraph of Section 28(1). It is true that Section 23(5) only provides for the transference of the liability for income-tax to the partners of a registered firm and does not provide for a similar transfer of the liability for a penalty. It might therefore be argued that in the absence of any provision corresponding to Section 23(5) regarding the liability of a registered firm for penalty, such liability remained where it arose and since a registered firm was a person within the meaning of the Act, it would be liable to pay a penalty and could be made liable under the general provisions of the Act, where the facts created a liability. That argument however would not meet the contention of Dr. Sen Gupta. His argument, it should be remembered, was that the concluding paragraph of Section 28(1) by its own terms excluded a registered firm from the liability for a penalty. The terms which he relied

upon, as I have already stated, were the two words "if any". As regards clause (b) of the proviso to which Mr. Meyer referred. Dr. Sen Gupta's answer was that it was really a provision itself creating a liability for a penalty in the case of persons who might be found to have no assessable income. Alternatively he argued that the proviso was considered necessary precisely for the reason that but for it a person having no assessable income and no income-tax to pay could not be made liable for a penalty at all because of the concluding paragraph of Section 28(1). In my opinion, there is no reason, apart from the provisions of the concluding paragraph of Section 28(1), on which Dr. Sen Gupta relied, to think that an assessee under the Income-tax Act cannot be made liable for a penalty even if he has committed one or other of the defaults, in case he is ultimately found to have no assessable income. The words "if any" in the concluding paragraph of Section 28(1) appear to me clearly to qualify not merely super-tax but the liability to tax itself. It is noticeable that the present case is one under clause (b) of Section 28(1) and the concluding paragraph of the section, when it refers to cases coming under clauses (b) and (c), speaks of "any tax payable by him" and not of "the amount of the income-tax and super-tax, if any", payable by him as it does when it refers to cases coming under clause (a). The words I have last quoted do appear in the concluding paragraph of Section 28(1) also, when it is dealing with clauses (b) and (c) but it is only for a reference to the hypothetical case of the tax which would have been avoided if the income returned had been accepted as the correct income. The latter part of the clause does not speak of "income-tax and super-tax, if any, payable by him", but simply of the tax which would have been payable on the amount of the returned income. It therefore appears to me that even when construed by its own language the concluding paragraph of Section 28(1) cannot be said to make it a condition precedent that a person must be liable to pay some income-tax or it may be also super-tax if he is to be made liable for a penalty. Clause (b) of the proviso to my mind emphasises that meaning of the concluding paragraph of Section 28(1) and rests on an assumption that under that provision a person may be chargeable to penalty although he may not be chargeable to tax. I am unable to agree with Dr. Sen Gupta that clause (b) of the proviso is itself a charging section and creates a liability for a penalty in the case of persons who may have no assessable income. The words of the clause are not that in the case contemplated by it, the person in default "shall be liable to pay a penalty" but the words are that "the penalty imposable under this sub-section shall be a penalty not exceeding twenty-five rupees." It is thus clear that the penalty contemplated by clause (B) of the proviso is penalty imposable otherwise than under the clause itself and what the clause does is merely to limit its quantum but not also to create a liability for the penalty. In the above view it appears to me that it was not really necessary for clause (d) of the proviso to enact specifically that a registered firm would be liable to pay a penalty despite the fact that it could not be charged and was not, in fact, charged to income-tax or super-tax. The whole argument of Dr. Sen Gupta was that the concluding paragraph of Section 28(1) had left a gap which had been attempted to be filled up by clause (d) of the proviso, but the attempt had not been successful. In my view the gap which undoubtedly existed in the concluding paragraph of Section 28(1) was only an absence of a provision regarding the quantum of the penalty that could be levied from a registered firm because the quantum depends upon the amount of income-tax payable. Since there could be no income-tax or super-tax payable by a registered firm the quantum of a penalty leviable for such a firm could not be determined and it is that omission which has now been made good by clause (d) of the proviso. In fact, it appears to me that so far as penalties imposed in cases coming under clauses (b) and (c) of Section 28(1) are concerned, it was not even necessary to make a new provision for the quantum because the amount of penalty prescribed by the latter part of sub-section (1) for such cases does not depend upon the income-tax or super-tax payable by the person in default, but depends upon the tax, if

any, which could have been avoided if the income returned had been accepted as the correct income. That language does not contain any reference to any income-tax payable by any particular person or the persons concerned but refers only to the amount of the income returned and the tax payable on it as a matter of computation. For the reasons I have given above, it appears to me that it is not correct to say that under the concluding paragraph of Section 28(1) a registered firm cannot be charged to a penalty, because of the fact that, as a firm, it is not assessed to income-tax or super-tax and because no such tax is payable by it. The question referred must, therefore, be answered in the affirmative. The Commissioner of Income-tax will have his costs of this reference.

Certified for two Counsel.

Lahiri, J. - I Agree.

Reference answered accordingly.

Cases Referred

1[1949] 17 I.T.R. 486