

BOMBAY HIGH COURT

Commissioner of Income-Tax

Vs

Rizumal Pherumal

(M Mohta, C.J. M Chandurkar, J.)

05.01.1981

JUDGMENT

Chandurkar, J.

1. At the instance of the Revenue, the following two questions have been referred to this court under section 256(1) of the Income-tax Act, 1961.

"(1) Whether, on the facts and in the circumstances of the case, the order of the Income-tax Officer imposing penalty on the assessee was without jurisdiction ?

(2) Whether, on the facts and in the circumstances of the case, the order of the Income-tax Officer imposing penalty was passed after giving the assessee a reasonable opportunity of being heard ?"

2. The assessee filed a return of income for the assessment year 1969-70 on June 28, 1969, declaring a total income of Rs. 52,799 on the basis of its books of account. The assessee had entered into a transaction with regard to the purchase of a house and had made a payment of Rs. 2,000 by way of earnest money to the vendor. The sale transaction, however, did not materialize and the amount of Rs. 2,000 by debiting it to its trading account.

3. In the assessment proceedings, the Income-tax Officer found that the assessee had tried to conceal the income of Rs. 2,000 by making false entry in the trading account. The Income-tax Officer made an assessment order on November 26, 1971, under section 143(3) of the Income-tax Act, 1961, on a total income of Rs. 54,993 which included the amount of Rs. 2,000 which was said to have been concealed. Since the Income-tax Officer was of the opinion that the assessee had concealed. Since the Income-tax Officer was of the opinion that the assessee had concealed the income of Rs. 2,000, he initiated penalty proceedings under section 271(1)(c) by issuing a notice under section 274(1) of the Act. The explanation given by the assessee before the Income-tax Officer raising a contention that penalty should not be imposed against him was

rejected by the Income-tax Officer and he levied a penalty of Rs. 2,000 holding that the assessee had concealed the income of Rs. 2,000. The order of the Income-tax Officer was confirmed by the Appellate Assistant Commissioner and the assessee then filed a second appeal before the Income-tax Appellate Tribunal.

4. The Income-tax Appellate Tribunal took the view that the penalty levied on the assessee had to be cancelled mainly on the ground that in accordance with section 274(2) as it stood on June 28, 1969, when the return was filed by the assessee, the Income-tax Officer did not have jurisdiction to levy the penalty, and the Tribunal placed reliance on the decision of the Madras High Court in *CGT v. C. Muthukumaraswamy Mudaliar*¹ and another decision of the same High Court in *Continental Commercial Corporation v. ITO*² The additional ground on which the order of penalty was set aside was that the show-cause notice issued to the assessee was ambiguous and uncertain with regard to the nature of the charge against the assessee, and the notice being vague, the assessee did not have reasonable opportunity of being heard. Out of these findings recorded by the Tribunal, the two questions reproduced earlier fall for consideration.

5. Shri Joshi appearing on behalf of the Revenue has contended that on the date on which the assessment order was made and the notice was issued, i.e., on November 26, 1971, the original provision of section 274(2) stood amended and that the Income-tax Officer was the only competent authority who could have issued the notice for imposition of penalty under section 271(1)(c). Shri Dewani on behalf of the assessee has, however, contended that even in respect of the authority authorised to issue a notice of penalty under section 274(2), the original provision in section 274(2) must continue to operate in spite of its express amendment by the Taxation Laws (Amendment) Act, 1970, with effect from April 1, 1971. The decision of the first question in this reference, therefore, turns on the decision of the question as to whether section 274(2) as it was prior to the amendment with effect from April 1, 1971, can be considered to be effective in spite of its amendment with effect from April 1, 1971. Section 274(2) in force on the date on which the return was filed, i.e., June 28, 1969, read as follows :

"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."

6. The material provision with regard to the quantum of penalty in section 271(1)(iii) read as follows :

"271(1). If the Income-tax Officer or the Appellate Assistant Commissioner in the course

of any proceedings under this Act, is satisfied that any person -

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income.

he may direct that such person shall pay by way of penalty, - ...

(iii) in the cases referred to in clause (c), in addition to any tax payable by him, a sum which shall not be less than, but which shall not exceed twice, the amount of the income in respect of which the particulars have been concealed or inaccurate particulars have been furnished."

7. Sub-section (2) of section 274 was amended by the Taxation Laws (Amendment) Act, 1970, with effect from April 1, 1971, and the amended provision read as follows :

"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 amount of income (as determined by the Income-tax Officer on assessment) in respect of which the particulars have been concealed or inaccurate particulars have been furnished exceeds a sum of twenty-five thousand rupees, 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."

8. Now, a perusal of the provisions of section 271(1)(iii) would show that at the material time when the return was filed on June 28, 1969, the minimum penalty imposable as far as the present case is concerned could not be less than Rs. 2,000 which was the amount of the concealed income, and it could not exceed Rs. 4,000 which is twice the concealed income of Rs. 2,000. Therefore, under section 274(2) as it was in force at the material time when the return was filed, it is not disputed that the minimum penalty imposable would exceed a sum of Rs. 1,000 and it would have become obligatory on the Income-tax officer to refer the case to the Inspecting Assistant Commissioner who was then empowered to deal with the matter relating to imposition of penalty.

9. As already pointed out, the provisions of section 274(2) were amended with effect from April 1, 1971. The effect of the amended provisions was that the Income-tax Officer was required to refer the case to the Inspecting Assistant Commissioner only if the amount of income in respect of which the particulars have been concealed or inaccurate particulars have been furnished, exceeded a sum of Rs. 25,000. The position, therefore, was that on November 26, 1971, when the assessment was concluded and the notice was issued, it was not necessary for the Income-tax Officer to refer the case of the assessee to the Inspecting Assistant Commissioner because the

amount in respect of which there was concealment did not exceed Rs. 25,000.

10. Now, admittedly the only provision relating to the procedure in the matter of imposition of penalty at the time when the notice was issued was the amended provision of section 274(2) as it stood amended with effect from April 1, 1971. Unless it is possible for Shri Dewani to show that the Income-tax Act with the express amendment made in section 274(2) whereby the requirement of referring the case to the Inspecting Assistant Commissioner where the penalty imposable exceeded a sum of Rs. 1,000 was substituted by the portion underlined above, continued to be operative, it will be difficult for us to accept the contention that the proceedings for imposition of penalty in the instant case were wholly without jurisdiction as held by the Tribunal. Section 274 expressly refers to the procedure. The liability to penalty is no doubt attracted by virtue of the provisions of section 271(1)(c), but how that liability is to be determined and by whom and what is the procedure to be adopted for the determination of that liability is provided for in section 274. Section 274 is thus clearly a procedural provision. It was not possible for Shri Dewani to point out how in the face of the express procedural provision in section 274(2) as it was operative on the date on which the assessment proceedings were concluded and the fact that the notice in the matter of imposition of penalty was issued on November 26, 1971, the Income-tax Officer was empowered to forward the case to the Inspecting Assistant Commissioner. There was no provision of law which empowered the Income-tax Officer to refer the case to the Inspecting Assistant Commissioner unless the amount of the income concealed exceeded Rs. 25,000. It is difficult for us to appreciate the reasoning of the Tribunal when it holds that the levy of penalty is without jurisdiction. When the Tribunal rejected the argument made on behalf of the Revenue that the amendment to section 274(2) with effect from April 1, 1971, cast the jurisdiction on the Inspecting Assistant Commissioner only in cases in which the minimum penalty imposable was Rs. 25,000, it appears that it was the view of the Tribunal that in view of the earlier unamended provision in section 274(2) which was in force on the date on which the return was filed, the Income-tax Officer did not have jurisdiction to levy penalty in a case where the penalty exceeded Rs. 1,000.

11. As already pointed out, the Tribunal has placed reliance on the decisions of the Madras High Court. But a careful perusal of the decision in *CGT v. C. Muthukumaraswamy Mudaliar*³ will show that the question involved in that case was not similar to the one which is involved in the present case. That was a case which dealt with the penalty under section 17(1)(a) of the Gift-tax Act, 1958. The question was whether the quantum of penalty which could be imposed against the assessee was to be determined on the basis of the penalty provision as it stood at the time when the default had taken place, or whether the penalty as provided in the amended provision when the amendment to section 17(1) was made after the date on which the assessee was due to file his return would determine the quantum of penalty. In that case, the assessee had filed the gift-tax

return for the assessment year 1962-63 on October 29, 1962. The Gift-tax Officer levied a penalty of Rs. 2,605 on March 31, 1964, on the completion of the assessment. The Appellate Assistant Commissioner reduced the penalty to Rs. 1,000. But on appeal by the Department the Tribunal did not accept the contention of Department that the Appellate Assistant Commissioner had erred in reducing the penalty as the Gift-tax Officer had levied the minimum penalty leviable under section 17(1) after its amendment in 1963, which was the law applicable at the time when the penalty was levied. A reference, therefore, came to be made at the instance of the Revenue to the High Court and the High Court held that the amendment to section 17(1)(a) of the Gift-tax Act, 1958, by the Gift-tax (Amendment) Act, 1962, with effect from April 1, 1963, will not be applicable to cases where the default had been committed before the Amendment Act came into force and the law applicable to the levy of penalty for such defaults was the law as it stood at the time when the default is committed and not as it stood on the date when the penalty proceedings were initiated or when the penalty order was imposed. Pointing out that the amendment to the Gift-tax Act was made in April, 1961, and that it was not clear as to whether the amendment was intended to apply to defaults or concealments which had taken place earlier, and that in the absence of clear language, the amendment must be interpreted as applying to future offences, the Division Bench of the Madras High Court observed (at page 552) :

"In cases relating to concealment of income, the penal provisions that were in force on the date of filing the return, out of which concealment of income arises, can be made applicable."

12. Section 17(1) of the Gift-tax Act is a provision which more or less corresponds to the substantive provision of penalty in section 271(1) of the Income-tax Act, which provides for minimum and maximum penalty. The question referred to the Madras High Court was expressly in respect of the effect of the amendment to section 17(1)(a) at the Gift-tax Act. The Madras High Court was not called upon to deal with the question as to whether the procedural provision as is contained in section 274(3) could not be availed of in a case where the original provision dealing with the procedure stood repealed or amended. The reliance on the decision in Muthukumaraswamy Mudaliar's case [1975] 98 ITR 540 (Mad)(Supra) was, therefore, not proper.

13. It is no doubt true that in *Continental Commercial Corporation v. ITO*⁴ the Madras High Court has taken the view that section 274(2) of the Income-tax Act, 1961, which relates to the jurisdiction of the Income-tax Officer to deal with penalty proceedings and which, by amendment, enlarged the jurisdiction of the Income-tax Officer with effect from April 1, 1971, was the provision dealing with the jurisdiction of the Officer to deal with a case and that it will apply even to the case where the offence of infringement was committed prior to the amendment.

The assessment proceedings in that case were for the assessment year 1970-71, the return for which was filed on December 22, 1970. The Income-tax Officer included a sum of Rs. 4,000 as income from undisclosed sources by his order dated January 25, 1973. He then initiated penalty proceedings under section 271(1)(c) of the Income-tax Act and levied a penalty of Rs. 4,000. The Commissioner confirmed this order of penalty which was challenged by the assessee by a writ petition in the High Court. The contention before the High Court was that by reason of the provisions of section 274(2) prior to its amendment with effect from April 1, 1971, by Act 42 of 1970, the Officer did not have any jurisdiction to levy the penalty. The High Court held that the law in force on December 22, 1970, when the return was filed was the law that would be applicable and in that view, the provisions of section 274(2), prior to its amendment on April 1, 1971, applied to the case and the Income-tax Officer had no jurisdiction to levy penalty. The learned judges relied on the decision in Muthukumaraswamy Mudaliar's case [1975] 98 ITR 540 (Mad)(Supra) as well as the decision of the Madhya Pradesh High Court in CIT v. Ramchand Kundanlal Saraf [1975] 98 ITR 474 for the view that the provisions relating to penalty are of a penal character and their object being to punish the assessee so as to deter him from transgressing the law in future, the quantum of penalty would have to be determined with reference to the law prevailing on the date when the act of concealment was committed and not when the penalty proceedings are initiated or completed. The learned judges, therefore, held that the law in force on December 2, 1970, when the return was filed was the one that would be applicable. It was contended before the Madras High Court on behalf of the Revenue that section 274(2) was a procedural provision and, therefore, the amendment would apply to all cases of infringement, whether committed before or after the amendment. This contention was negated by the learned judges holding that the provision relates to the jurisdiction of the Income-tax Officer to deal with penalty proceedings. With respect to the learned judges, we are unable to concur with the view taken by them. It is no doubt true that when section 274(2) nominated either the Income-tax Officer or the Inspecting Assistant Commissioner as authorities who are to deal with the penalty proceedings of the nature specified therein and to that extent, it is a provision which related to jurisdiction, there is nothing which prevents Parliament from enacting a law vesting such jurisdiction in such officer as it chooses with effect from a specified date. When the Madras High Court in the earlier case under the Gift-tax Act took the view that the provisions in force on the date when the default took place would be the material provisions while dealing with penalty, as already pointed out, the learned judges in that case were dealing with procedural provisions relating to quantum of penalty. With respect to the learned judges of the Madras High Court, it appears to us that any reference to the concept of retrospective operation of section 274(2) after it was amended with effect from April 1, 1971, is wholly uncalled for so far as its construction is concerned. It is, pure and simple, a procedural provision which prescribes the jurisdiction of two officers, namely, the Income-tax Officer and the Inspecting Assistant Commissioner. When it is

exercised at any point of time after it has come into force, that does not mean that the section is operating retrospectively. The provision is analogous to the provisions for trial of offences and it, therefore, governs any action to be taken in respect of a default which may have taken place prior to the amendment on April 1, 1971. As on the date on which action was taken by the Income-tax Officer, as already pointed out, he could not have looked to any other provision except section 274(2) as amended with effect from April 1, 1971, and, as the provision then stood, there was no scope for referring the matter to the Inspecting Assistant Commissioner. In the view which we have taken, question No. 1 has to be answered in the negative and in favor of the Revenue.

14. So far as question No. 2 is concerned, Shri Dewani, learned counsel for the assessee, has conceded before us that in view of the smallness of the amount involved, the question may be answered in the affirmative and in favour of the Revenue. The assessee to pay the costs of this reference.

Cases Referred.

1[1975] 98 ITR 540

2[1975] 100 ITR 170

3[1975] 98 ITR 540 (Mad)

4[1975] 100 ITR 170