

# **BOMBAY HIGH COURT**

Commissioner of Income Tax

Vs

Deorao Shrawan Maundekar

(S.P Bharucha, C.J. V Mohta ,J.)

14.01.1987

## **JUDGMENT**

### **S.P. Bharucha, J.**

1. This is a reference under section 256(1) of the Income-tax Act, 1961, made at the instance of the Revenue. The questions that are posed read thus :

"(1) Whether, on the facts and in the circumstances of the case, the amendment of section 271(1)(c)(iii) which is effective from April 1, 1968, was applicabl ?

(2) Whether, on the facts and in the circumstances of the case, the amendment of section 274(2) which is effective from April 1, 1971, was applicabl ?

2. The reference relates to the assessment year 1959-60. The assessment for this assessment year was completed on January 11, 1960, and the total income was assessed at Rs. 6,517. In December, 1964, a search at the assessee's business and residential premises yielded material which showed that income relating to the concerned assessment year had not been fully disclosed. The assessment was thereupon reopened under section 147 of the Income-tax Act, 1961, and a notice under section 148 was served on the assessee on March 28, 1967. On March 7, 1969, and May 13, 1969, the assessee filed return pursuant to the notice under section 148 declaring his total income at Rs. 6,517 as assessed in the first instance. On August 5, 1969, the assessee filed a revised return declaring a total income of Rs. 18,120. The reassessment was made by an order dated February 24, 1970, determining the total income at Rs. 21,270. The assessment order stated : "Issue notice under section 274 for the default under section 271(1)(a) for late filing of return and section 271(1)(c) for concealing the particulars of income." The Income-tax Officer referred the case in regard to penalty to the Inspecting Assistant Commissioner in view of the fact that the minimum penalty imposable was more than Rs. 1,000. By his order dated October 22, 1971, the Inspecting Assistant Commissioner imposed a penalty upon the assessee in the sum of Rs. 17,500. The assessee carried the matter regarding penalty in

appeal to the Income-tax Appellate Tribunal. The Tribunal quashed the penalty.

3. It is relevant to mention only one other fact and that is that by an amendment dated April 1, 1971, the provisions of section 274, sub-section (2), were amended and the Income-tax Officer was required to refer to the Inspecting Assistant Commissioner matters in regard to the imposition of penalty only where the amount of income concealed exceeded a sum of Rs. 25,000. Prior to the amendment, the Income-tax Officer required to do so if the minimum penalty imposable exceeded Rs. 1,000.

4. Upon the findings of the Tribunal, the two questions that are posed arise and we heard Mr. Jetly, learned counsel for the Revenue, at length, upon both. Thereafter, Mr. Thakar, learned counsel for the respondent, argued the matter, in so far as it concerned the first question, at some length. He thereafter, pursuant to the discussion thereon, stated that the first question may be answered in the affirmative and in favour of the Revenue. The first question will, accordingly, be so answered.

5. In regard to the second question, Shri Jetly submitted, and in our view rightly, that it had to be answered in the negative and in favour of the Revenue in view of a Division Bench judgment of this court, which is in Income-tax Reference No. 260 of 1976 *CIT v. Rizumal Pherumal*<sup>1</sup> decided by Chandurkar and Mohta JJ. on January 5, 1981. Here too the question before the court was whether the order of the Income-tax Officer imposing a penalty on the assessee was without jurisdiction. The Tribunal had taken the view that the penalty levied on the assessee had to be cancelled on the ground that, in accordance with section 274(2) as it stood on the date when the return was filed by the assessee, the Income-tax Officer did not have jurisdiction to levy the penalty. Upon a consideration of the provisions of section 274, this court observed that it was a procedural provision. As on the date on which action was taken by the Income-tax Officer in regard to the imposition of penalty, i.e. on November 26, 1971, 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.

6. We read this judgment as indicating that the relevant date for the purpose of determining who has the power to levy a penalty is the date upon which the Income-tax Officer decided that a penalty must be levied. In the instant case, he so decided on February 24, 1970, which is the date of the assessment order. It is the provision which was then upon the statute book which is relevant. As that provision then stood, it was the Inspecting Assistant Commissioner who had that jurisdiction and the exercise of that jurisdiction by the Inspecting Assistant Commissioner must, therefore, be upheld.

7. We may here note the judgment of the Orissa High Court in CIT v. Dhadi Sahu [1976] 105 ITR 56, relied upon by Shri Thakar, learned advocate for the assessee. It undoubtedly supports Shri Thakar's submission that it is the date upon which the order imposing the penalty is made which is relevant for determining the jurisdiction to impose it, but we are bound by the view taken in the judgment of the Division Bench of this court referred to above. In the circumstances, we must answer the second question in the negative and in favour of the Revenue.

8. In conclusion, the first question is answered in the affirmative and in favour of the Revenue. The second question is answered in the negative and in favour of the Revenue.

9. The assessee shall pay to the Revenue the costs of this reference.

Cases Referred.

1[1988] 169 ITR 25