

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**NAGPUR BENCH, NAGPUR**

**Income Tax Reference No.21 of 2008**

M/s. Maharaj Garage & Company,  
Mirchi Bazar, Itwari, Nagpur. ... Applicant

Versus

The Commissioner of Income Tax,  
Vidarbha, Nagpur,  
Now  
Commissioner of Income Tax-II,  
Nagpur. ... Respondent

Shri K.P. Dewani, Advocate for Applicant.  
Shri S.N. Bhattad, Advocate for Respondent.

**Coram : R.K. Deshpande & Manish Pitale, JJ.**

Date of Reserving the Judgment : 11<sup>th</sup> August, 2017

Date of Pronouncing the Judgment : 22nd August, 2017

**Judgment (Per R.K. Deshpande, J.) :**

1. The proceedings under Section 143(3) read with

Section 147(a) of the Income Tax Act, 1961 for the Assessment Year 1987-88, completed on 30-3-1988, declaring the total income of Rs.1,12,380/- on 1-10-1987, were re-opened by the Department of Income Tax. In the order dated 30-9-1988 passed in such proceedings, two crucial findings were recorded - (i) that the assessee has concealed the particulars of his income for the Assessment Year 1987-88; and (ii) that he has furnished the inaccurate particulars of such income. It holds that against the net profit of Rs.11,02,329.38, the assessee has declared the net profit of Rs.1,90,808.38 in the return of income filed on 1-10-1987. Thus, there was clear suppression of income by the assessee to the extent of Rs.9,11,521/-.

2. The Income Tax Officer, who made this assessment, issued the notice dated 30-9-1988 to the assessee proposing to impose the penalty under Section 271 of the Income Tax Act and initiated the proceedings. The assessee filed the reply through his counsel on 17-2-1989 denying that he has committed any offence within the meaning of Section 271(1)(c) of the Income

Tax Act and urging that there is no evidence on record to hold that the assessee has either concealed the particulars of his income for the Assessment Year 1987-88 or has furnished the inaccurate particulars of such income. Apart from this, there were other contentions, which were raised.

3. The Income Tax Officer, considering the facts and circumstances of the case, held that this is a fit case of levy of penalty under Section 271(1)(c) of the Income Tax Act for the act of concealing particulars of income by the assessee by furnishing inaccurate particulars of income in the return filed on 1-10-1987. The maximum penalty imposable under the said provision was 200%; however, the Income Tax Officer imposed minimum penalty equivalent to the tax sought to be evaded of Rs.4,60,000/-. Accordingly, the order was passed on 3-3-1989 after seeking prior approval of the Deputy Commissioner of Income Tax, as required by the said provision.

4. The Commissioner of Income Tax (Appeals), Nagpur, entertained the statutory appeal and reduced the ultimate penalty imposed to Rs.3,95,367/- in further appeal before the Income Tax Appellate Tribunal, Nagpur, which has maintained the order passed by the Commissioner of Income Tax (Appeals) by dismissing the appeal on 7-1-1994.

5. In this reference under Section 256(1) of the Income Tax, the Income Tax Appellate Tribunal referred the following questions as the questions of law for determination of this Court arising out of its order dated 7-1-1994.

- “1. Whether on the facts and in the circumstances of the case, the levy of penalty is legal and justified?*
- 2. Whether on the facts and in the circumstances of the case, the assessee was given a reasonable opportunity of being heard?*
- 3. Whether on the facts and in the circumstances of the case, the approval of Deputy Commissioner of*

*Income Tax, Range-1, is in accordance with law?*

4. *Whether on the facts and in the circumstances of the case it was necessary for the Deputy Commissioner of Income Tax to give an opportunity to the assessee before granting approval to the order imposing penalty?”*

6. The basic question, which falls for consideration of this Court, as has been urged, is, while granting previous approval by the Inspecting Assistant Commissioner, as required under the proviso below Section 271(1)(c)(iii) of the Income Tax Act, the assessee was required to be given a reasonable opportunity of being heard?

7. Shri K.P. Dewani, the learned counsel appearing for the assessee; and Shri S.N. Bhattad, the learned counsel appearing for the Department, have cited before us several decisions of the Apex Court as well as of the different High Courts in support of their rival contentions. Shri Dewani urged that the grant of approval by the Inspecting Assistant Commissioner results in civil

consequences of imposition and recovery of penalty, which could only be done after giving a reasonable opportunity to furnish an explanation and of being heard in the matter. According to him, the power to grant prior approval conferred upon the Inspecting Assistant Commissioner is quasi judicial in nature, and even if it is considered to be an administrative power, the requirement of following the principles of natural justice is implicit in it. Shri Bhattad, on the other hand, urged that the power of granting previous approval is purely administrative in nature and there is no question of granting an opportunity to explain and of being heard before granting such approval. He further urged that there is no specific requirement under the Statute and, therefore, such requirement cannot be read in it.

8. In order to consider the rival contentions, we have to see the provision of Section 271 of the Income Tax Act to the extent relevant in the present case, as it stood on the date of passing of the order of imposing the penalty. Hence, the said provision is reproduced below :

*“Failure to furnish returns, comply with notices, concealment of income, etc.*

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 twenty per cent, but which shall not exceed one and a half times the amount of the tax, if any, which would have been avoided if the income as returned by such person had been accepted as the correct income :*

*Provided that, if in a case falling under clause (c), 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 not issue any direction for payment by way of penalty without the previous approval of the Inspecting Assistant Commissioner.”*

9. The aforesaid provision confers a discretion upon the competent authority (in the present, the Income Tax Officer) in respect of the quantum of penalty, which ranges between twenty per cent to twice (i.e. 200%) of the amount of tax sought to be levied. While imposing penalty, the competent authority has to be satisfied that a person has concealed the particulars of his income or furnished the inaccurate particulars of such income. Such satisfaction has to be arrived at on the basis of the objective assessment of the material available on record. The power of adjudication of penalty under the said provision is quasi judicial



in nature.

10. Section 274 of the Income Tax Act deals with the procedure for imposing penalty and sub-section (1) therein states that no order imposing a penalty under this Chapter shall be made unless the assessee has been heard, or has been given a reasonable opportunity of being heard in the matter. If any order is passed imposing the penalty, it can be the subject-matter of statutory appeal under Section 246 of the said Act before the Commissioner of Income Tax (Appeals) and thereafter a further appeal to the Income Tax Appellate Tribunal.

11. In the case of concealment of particulars of income and furnishing of inaccurate particulars of such income, clause (iii) under Section 271(1)(c) of the Income Tax Act empowers the imposition of penalty in addition to any tax payable by the assessee, a sum which shall not be less than, but which shall not exceed twice, the amount of tax sought to be evaded. If the amount of income concealed or in respect of which inaccurate

particulars have been furnished exceeds a sum of Rs.25,000/-, the competent authority, viz. the Income Tax Officer, cannot issue any direction for payment by way of penalty without the previous approval of the Inspecting Assistant Commissioner.

12. The provision of Section 271(1)(c)(iii) of the Income Tax does not attract the rule of presumption of *mens rea* and it cannot be equated with the provision in the Criminal Statute. The penalty is for default in complying with the provision, i.e. of furnishing true and correct particulars of the income in the return. The penalty is imposable for breach of the civil obligation. It is only the reasonable opportunity of being heard in the matter, which is required to be provided to the assessee. The enquiry seems to be of summary in nature, which does not even call for issuance of show cause notice in respect of the quantum of penalty proposed to be imposed. While exercising the discretion in respect of the quantum of penalty, the explanation furnished by the assessee to mitigate the rigour of penalty has to be considered, having regard to the intention of

the assessee, if any, to evade the tax, as one of the factors.

13. The provision of Section 271(1)(c)(iii) of the Income Tax Act contemplates only one and not the dual proceedings of imposition of the penalty in respect of the notice issued therein. The provision has to be read as a whole and it cannot be split up. The requirement of obtaining previous approval of the Inspecting Assistant Commissioner is a step in such proceedings to be mandatorily complied with by the competent authority (in the present case, the Income Tax Officer). The non-compliance of it may vitiate the order imposing the ultimate penalty. The provision nowhere contemplates another opportunity of being heard in the matter before granting approval. The power to grant previous approval is purely administrative in nature. The object is to safeguard the interest of assessee against arbitrary exercise of power by the competent authority while imposing penalty. It is in the nature of control over the action of the subordinate authority. While granting previous approval, the higher authority can see whether the procedure prescribed for it,

is followed and that there is a material available on record for imposing the penalty and the extent of penalty imposed is proportionate to the act of default. If the ultimate imposition of penalty under Section 271 of the Income Tax Act is found to be bad in appeal under Section 246 of the said Act or thereafter, the previous approval granted therein shall collapse or would not survive, even in the absence of specific challenge to it.

14 We have gone through the several decisions cited before us by the learned counsels appearing for the assessee and the Department of Income Tax. The decisions cited by Shri Dewani for the assessee are not on the provision of Section 271 of the Income Tax Act, as it existed when the order of penalty was passed. It is not possible for us to accept the contention that wherever the Act prescribes the requirement of obtaining previous approval, the compliance of the principles of natural justice of being heard in the matter is called for. No such universal principle can be laid down and it depends upon the language of the provision and the object and purpose of it. We,

therefore, hold that the requirement of following the principles of natural justice before granting approval cannot be imported in the proviso below Section 271(1)(c)(iii) of the Income Tax Act. The questions of law at serial Nos.2 and 4 are, therefore, answered in the negative.

15. The requirement of Section 274 of the Income Tax Act for granting reasonable opportunity of being heard in the matter cannot be stretched to the extent of framing a specific charge or asking the assessee an explanation in respect of the quantum of penalty proposed to be imposed, as has been urged. The assessee was supplied with the findings recorded in the order of re-assessment, which was passed on the same date on which the notice under Section 271(1)(c) was issued, initiating the proceedings of imposing the penalty. The assessee had sufficient notice of the action of imposing penalty. We, therefore, do not find either any jurisdictional error or unjust exercise of power by the authority.

16. It is not in dispute that a reasonable opportunity of being heard in the matter, as required by Section 274 of the said Act was given to the assessee before imposing the penalty by the Income Tax Officer. The assessee furnished his explanation, which has been taken into consideration in the order. The mandatory requirement of obtaining the previous approval of the Inspecting Assistant Commissioner was followed. The penalty imposed by the Income Tax Officer was reduced by the Appellate Authority. There was no arbitrary exercise of discretion and the reasons are recorded after taking into consideration the explanation submitted by the assessee. The exercise of jurisdiction in respect of quantum of penalty is neither unjust nor beyond jurisdiction. The questions of law at serial Nos.1 and 3 are, therefore, answered in the negative.

17. The reference is answered in the negative, as above.  
No order as to costs.

(Manish Pitale, J.)

(R.K. Deshpande, J.)