

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD  
SPECIAL CIVIL APPLICATION No. 5993 of 2001

For Approval and Signature:

HONOURABLE MS.JUSTICE HARSHA DEVANI  
HONOURABLE MS.JUSTICE B.M.TRIVEDI

- =====
- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
  - 2 To be referred to the Reporter or not ?
  - 3 Whether their Lordships wish to see the fair copy of the judgment ?
  - 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
  - 5 Whether it is to be circulated to the civil judge ?
- =====

SHAYAMA SANJAY SHAH - Petitioner(s)

Versus

COMMISSIONER OF INCOME TAX - Respondent(s)

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Appearance :

MR JP SHAH for Petitioner(s) : 1,  
MRS MAUNA M BHATT for Respondent(s) : 1,

=====

CORAM : HONOURABLE MS.JUSTICE HARSHA DEVANI

and

HONOURABLE MS.JUSTICE B.M.TRIVEDI

Date : 25/03/2011

ORAL JUDGMENT

(Per : HONOURABLE MS.JUSTICE HARSHA DEVANI)

1. By this petition under Article 226 of the Constitution of India, the petitioner has challenged order dated 28.3.2001 passed by the Commissioner of Income Tax, Surat, under section 273A of the Income Tax Act, 1961 (the Act), whereby, he has rejected the petitioner's application for waiver of interest and penalty.

2. The facts of the case stated briefly are that in respect of the assessment year 1987-88, the petitioner was charged interest under section 139 as also under section 215 of the Act and penalty was also levied under sections 271(1)(a) and 273(1)(b) of the Act. The petitioner made an application under section 273 of the Act on 30.11.1992, *inter alia*, stating that the petitioner had fulfilled all the conditions mentioned in section 273A of the Act for total waiver of the interest and penalties. It was also stated in the application that the petitioner had voluntarily and in good faith made full and true disclosure of her income prior to the issue of notice under section 139(2) of the Act and had cooperated in the inquiry relating to the assessment of income and had also paid the tax and interest payable in consequence of the assessment order. After a period of about eight years the Commissioner of Income Tax Surat the respondent herein rejected the said application by the impugned order dated 28.03.2001. Being aggrieved, the petitioner has filed the present petition challenging the said order.

3. Mr. J. P. Shah, learned advocate appearing on behalf of the petitioner invited attention to the provisions of section 273A of the Act to submit that while considering an application for waiver under the said section, the Commissioner is required to record satisfaction in respect of the matters provided under the said section. Inviting attention to the impugned order, it was submitted that the Commissioner has rejected the application on the ground that the reasons advanced by the petitioner for not filing the return in time were not reasonable and that the petitioner had already made payment of entire penalties and interest demanded by the said order and, therefore, there was nothing to waive. It was submitted that the Commissioner has failed to take into consideration the relevant factors as contemplated under section 273A of the Act and has rejected the application on extraneous grounds which are not relevant insofar as the provisions of section 273A of the Act are concerned. Referring to the provisions of section 273A of the Act, it was submitted that while making the order under section 273A of the Act the Commissioner was required to consider the relevant factors as envisaged thereunder even in case where the assessee had paid the tax and interest payable in consequence of the order in respect of which the application under section 273A had been filed. It was, accordingly, submitted that the second ground for rejecting the application, viz., the payment of entire interest and penalty demanded under the order in respect of which the

application had been filed had already made, and therefore, there was nothing to waive, is contrary to the provisions of the section 273A of the Act under which the Commissioner has exercised powers. It was submitted that under the circumstances, the impugned order being inconsistent with the provisions of section 273A of the Act, is required to be quashed and set aside. In support of his submission, the learned advocate placed reliance upon a decision of this High Court in the case of ***Vinodchandra C. Patel Vs. Commissioner of Income Tax, (1995) 211 ITR 232.***

4. On the other hand, Mrs. Mauna Bhatt, learned Senior Standing Counsel appearing on behalf of the respondent submitted that powers exercised by the Commissioner under section 273A of the Act are in the nature of discretionary powers, hence, this Court in exercise of powers under Article 226 of the Constitution of India would ordinarily not interfere with the same and substitute its own opinion in place of that of the Commissioner. It was, accordingly, urged that the petition being devoid of merit deserves to be dismissed.

5. Section 273A makes provision for “*Power to reduce or waive penalty, etc., in certain cases*” and as it stood at the relevant time, insofar as the same is relevant for the present purpose, reads thus:

**273A.-.**(1) *Notwithstanding anything contained in this Act, the Commissioner may,*

*in his discretion, whether on his own motion or otherwise, -*

*(i) reduce or waive the amount of penalty imposed or imposable on a person under clause (i) of sub-section (1) of section 271 for failure, without reasonable cause, to furnish the return of total income which he was required to furnish under sub-section (1) of section 139; or*

*(ii) reduce or waiver the amount of penalty imposed or imposable on a person under clause (iii) of sub-section (1) of section 271; or*

*(iii) reduce or waive the amount of interest paid or payable under sub-section (8) of section 139 or section 215 or section 217 or the penalty imposed or imposable under section 273,*

*if he is satisfied that such person-*

*(a) in the case referred to clause (i), has, prior to the issue of a notice to him under sub-section (2) of section 139, voluntarily and in good faith made full and true disclosure of his income;*

*(b) in the case referred to in clause (ii), has, prior to the detection by the Income-tax officer, of the concealment of particulars of income or of the inaccuracy of particulars furnished in respect of such income, voluntarily and in good faith, made full and true disclosure of such particulars;*

*(c) in the cases referred to in clause (iii), has, prior to the issue of a notice to him under sub-section (2) of section 139, or where no such notice, has been issued and the period for the*



*issue of such notice has expired, prior to the issue of notice to him under section 148, voluntarily and in good faith made full and true disclosure of his income and has paid the tax on the income so disclosed.*

*and also has, in all the cases referred to in clauses (a), (b) and (c), co-operated in any enquiry relating to the assessment of his income and has either paid or made satisfactory arrangements for the payment of any tax or interest payable in consequence of an order passed under this Act, in respect of the relevant assessment year.*

**Explanation:** *For the purpose of this sub-section, a person shall be deemed to have made full and true disclosure of his income or of the particulars relating thereto in any case where the excess of income assessed over the income returned is of such a nature as not to attract the provisions of clause (c) of sub-section (1) of section 271."*

6. On plain reading of the aforesaid provision, it is apparent that the same empowers the Commissioner in his discretion, whether on his own motion or otherwise, to reduce or waive the amount of penalty imposed or imposable on a person under clause (i) of sub-section (1) of section 271 for failure, without reasonable cause, to furnish the return of total income which he was required to furnish under sub-section (1) of section 139. Thus, the question of waiver would arise in a case where there is failure without reasonable cause to furnish return of total income as required under sub section (1) of section

139 of the Act. In the circumstances, the question as to whether there was a reasonable cause for failure in furnishing return of total income under section 139(1) would have been considered at the time of levying penalty under clause(i) of sub-section (1) of section 271 of the Act and it is only when the adjudicating authority finds that there is no reasonable cause for such failure that penalty would have been levied. In view of the provisions of section 273B of Act, in case, the assessee were in a position to make out a case that there was reasonable cause for such failure, no penalty could have been imposed under sec 271(1)(i) of the Act. Therefore, the very fact that penalty has been imposed under the said section indicates that no reasonable cause had been made out. Also the opening portion of section 273A makes it amply clear that such power has to be exercised where penalty has been levied for failure to show reasonable cause. Hence, when the question of waiver of penalty already imposed arises, there would be no reason for the Commissioner to go into the question as to whether the return has been filed belatedly without reasonable cause. While deciding an application under section 273A of the Act in a case where penalty is imposed or imposable on a person under clause (i) of sub-section (1) of section 271, the Commissioner is required to be satisfied that the assessee had prior to issue notice to him under sub-section (2) of section 139, voluntarily and in good faith made full and true disclosure of his income. In case, where reduction or waiver of

interest is sought for, the Commissioner has to record satisfaction to the effect that prior to the issue of notice under section (2) of section 139, or where no such notice, has been issued and the period for the issue of such notice has expired, prior to the issue of notice under section 148, the assessee has voluntarily and in good faith made full and true disclosure of his income and has paid the tax on the income so disclosed. The Commissioner is also required to be satisfied that such person has co-operated in any enquiry relating to the assessment of his income. He is also required to be satisfied that such person has either paid or made satisfactory arrangements for the payment of any tax or interest payable in consequence of an order passed under the Act in respect of the relevant assessment year. Thus, while considering the application under section 273A, the Commissioner is required to be satisfied as aforesaid.

7.A perusal of the impugned order shows that two factors have weighed with the Commissioner while rejecting the said application. Firstly that the reasons advanced by the petitioner for failure to file return within time cannot be said to be reasonable; and secondly that the petitioner had made payment of entire penalty and interest, therefore, there was nothing to waive. Insofar as the first factor is concerned, as discussed hereinabove, no question arises of going into that issue while considering an application under section 273A of the



Act. Insofar as the second factor is concerned, as is apparent on a plain reading of section 273A, for granting relief under the said provision the Commissioner is required to record satisfaction that such person has either paid or made satisfactory arrangements for payment of any tax or interest payable in consequence of an order passed under the Act in respect of the relevant assessment year. Thus, the very reason why the Commissioner should have recorded satisfaction in favour of the petitioner has been considered to be a ground for non-consideration of the application by the Commissioner. Thus, instead of recording satisfaction or otherwise, in respect of the grounds prescribed under section 273A of the Act, the Commissioner had totally misdirected himself and decided the application on grounds that were not germane for the purpose of deciding the application under section 273A of the Act.

8. Though it is true that powers under section 273A of the Act are discretionary powers, it is equally true that powers conferred under a statute are required to be exercised in consonance with the provisions of the said statute. In the present case, as discussed hereinabove, the Commissioner instead of recording satisfaction or otherwise in respect of the grounds prescribed under section 273A of the Act, has rejected the petition on irrelevant grounds, firstly, on the ground that there was no reasonable cause for failure in filing the return of income belatedly, and secondly, on the ground that the petitioner had already paid the tax payable in consequence of the

order of penalty, which ground in view of the provisions of section 273A of the Act should have, in fact, weighed in favour of the petitioner. Thus, the Commissioner has not exercised discretion as required under section 273A of the Act and as such the impugned order suffers from the vice of non application of mind to the relevant factors and as such cannot be sustained.

9. For the foregoing reasons, petition succeeds and is accordingly allowed. The impugned order dated 28.3.2001 passed by the Commissioner of Income Tax, Surat (Exhibit "B" to the petition), is hereby quashed and set aside. The application made by the petitioner under section 273A of the Act shall stand restored to the file of the Commissioner who shall decide the same afresh in accordance with law keeping in mind the provisions of section 273A of the Act. Considering the fact that this is a matter pertaining to Assessment Year 1987-88 and the present petition has been pending before this Court for a period of about ten years, it would be in the interests of justice that the matter be decided at the earliest. The respondent Commissioner, therefore, shall decide the application as expeditiously as possible, and not later than three months from the date of receipt of a copy of this order. Rule is made absolute accordingly with no order as to costs.

(HARSHA DEVANI, J.)

(BELA TRIVEDI, J. )

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**THE HIGH COURT  
OF GUJARAT**

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