

(1977) 08 AHC CK 0052

In the Allahabad High Court

Case No : Income-tax Reference No. 462 of 1973

Addl. Commissioner of Income Tax

APPELLANT

Vs

Prem Kumar Rastogi

RESPONDENT

Date of Decision : 05-08-1977

Acts Referred:

Income Tax Act, 1961 — Section 249
Income Tax Rules, 1962 — Rule 45

Citation : (1978) 7 CTR 113 : (1978) 115 ITR 503

Hon'ble Judges : C.S.P. Singh, J; B.N. Sapru, J

Bench : Division Bench

Advocate : Ashok Gupta and Deokinandan, for the Appellant; None, for the Respondent

Judgement

C.S.P. Singh, J.—The Income Tax Appellate Tribunal, Allahabad Bench, Allahabad, has referred the following question for our consideration :

"Whether, on the facts and in the circumstances of the case, the Tribunal was correct in holding that the assessee's failure to enclose the demand notice with the memorandum of appeal in Form No. 35, prescribed under rule 45 of Income Tax Rules, 1962, was a mere irregularity which did not render the appeal invalid ?"

2. The facts relating to the reference may be shortly stated. The assessee is a Hindu undivided family and was assessed for the assessment year 1965-66 by order dated February 28, 1967. An appeal was filed by it before the Appellate Assistant Commissioner on March 23, 1969. An objection was taken by the Income Tax Officer that there was delay in filing the appeal as the demand notice was served on the assessee on March 1, 1967. This was denied by the assessee. The assessee's contention was that it came to know of the assessment in October, 1967, and applied for a copy of the assessment order and demand notice thereafter. The demand notice was actually served on it on April 8, 1969, when it appeared before the Appellate Assistant Commissioner on April 8, 1969.

The copy of the assessment order, according to the assessee, was obtained on February 23, 1969. It was further alleged that although the copy of the demand notice was received on April 8, 1969, it was lost, whereupon he applied for a fresh copy but the copy was never issued. The Tribunal found that the assessment order and the demand notice were served on one Sri R. K. Rastogi on March 7, 1967, but Rastogi was an employee and not an authorised agent of the assessee. This conclusion was reached by the Tribunal on the view that there was no material on the record to hold that Rastogi was an authorised agent of the assessee to receive the notices. It negated the contention of the department that Rastogi should be treated as the authorised agent of the assessee to receive the notices of the assessment order and demand notice, as in the past he had been accepting the notices on the ground that this practice was not in itself sufficient to constitute Rastogi as an authorised agent. It believed the statement of the assessee's representative that the assessee had no knowledge of the completion of the assessment proceeding till October, 1967, and that on coming to know of it immediately applied to the Income Tax Officer for copy of the assessment order and demand notice. It also found that the copies of the assessment order and demand notice were issued to the assessee on February 23, 1969, and April 8, 1969. As regards failure of the assessee to enclose the demand notice in the appeal memo it was held that inasmuch as neither Section 249 nor rule 45 of the Income Tax Rules necessitate the demand notice being enclosed to the memo of appeal the appeal cannot be said to be defective.

3. The view taken by the Tribunal appears to be correct. The relevant part of Section 249 of the Income Tax Act and rule 45 thereof are to the following effect.

Section 249 :

"(1) Every appeal under this Chapter shall be in the prescribed form and shall be verified in the prescribed manner."

Rule 45:

"(1) An appeal under--

(i) Section 55A, read with Clause (ha) of Sub-section (1) of Section 23 of the Wealth-tax Act 1957 (27 of 1957), or

(ii) Section 246, or

(iii) Section 247, or

(iv) Section 248, to the Appellate Assistant Commissioner shall be made in Form No. 35.

(2) The form of appeal prescribed by Sub-rule (1), the grounds of appeal and the form of verification appended thereto shall be signed--

(a) in the case of an individual, by the individual himself ; where the individual is

absent from India, by the individual concerned or by some person duly authorised by him in this behalf ; and where the individual is mentally incapacitated from attending to his affairs, by his guardian or by any other person competent to act on his behalf;

(b) in the case of a Hindu undivided family by the karta, and where the karta is absent from India or is mentally incapacitated from attending to his affairs, by any other adult member of such family ;

(c) in the case of a company, by the managing director thereof, or where for any unavoidable reason such managing director is not able to sign and verify the return, or where there is no managing director, by any director thereof;

(d) in the case of a local authority, by the principal officer thereof;

(e) in the case of any other association, by any member of the association or the principal officer thereof; and

(f) in the case of any other person, by that person or by some person competent to act on his behalf."

4. It is apparent that neither Section 249 nor rule 45 makes it incumbent on the assessee to enclose the demand notice along with the memo of appeal. The assessee may enclose the demand notice in order to demonstrate that the appeal is within time; but failure to do so could not render the appeal beyond limitation, if it is otherwise within time. We are fortified in the view that we take by the decision of the Supreme Court in *Lakshmiratan Engineering Works Ltd. v. Assistant Commissioner (J) Sales-tax* [1968] 21 STC 154.

5. In view of this conclusion we answer the question in the affirmative, against the department and in favour of the assessee. As none appeared on behalf of the assessee, there will be no order as to costs. The counsel's fee will be assessed at Rs. 200.