
(2005) 01 P&H CK 0049

In the Punjab And Haryana At Chandigarh

Case No : Income-tax Reference No. 61 of 1995

Commissioner of Income Tax

APPELLANT

Vs

Ashoka Dairy

RESPONDENT

Date of Decision : 07-01-2005

Acts Referred:

Finance Act, 1995 — Section 271B, 44AB

Income Tax Act, 1961 — Section 139, 139(1), 234A, 256(1), 271(1)

Citation : (2006) 200 CTR 211 : (2005) 279 ITR 32

Hon'ble Judges : Jasbir Singh, J;G.S. Singhvi, J

Bench : Division Bench

Advocate : Rajesh Bindal, for the Appellant; None, for the Respondent

Judgement

G.S. Singhvi J.—On an application made by the Revenue u/s 256(1) of the Income Tax Act, 1961 (for short, "the Act"), the Income Tax Appellate Tribunal, Delhi Bench "B" Delhi (for short, "the Tribunal") has referred the following question of law for the opinion of this court:

"Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in confirming the order of the learned Commissioner of Income Tax (Appeals), Karnal, who deleted the penalty of Rs. 1 lakh imposed u/s 271B of the Income Tax Act, 1961 by the Assessing Officer?"

2. The assessee is engaged in the sale of milk. For the assessment year 1985-86, its turnover was more than Rs. 40 lakhs. Therefore, in terms of Section 44AB of the Act. it was required to file return latest by July 31, 1985 (the date was extended to September 30, 1985, by the Central Board of Direct Taxes vide its Circular No. 422 dated June 19, 1985 [1985] 155 ITR 44. However, the return was actually filed on November 29, 1985. The same was accompanied by the audit report prepared by the chartered accountant, namely, M/s. Rajesh Behl and Associates. Later on, the assessee filed revised return under the amnesty scheme. The Assessing Officer accepted the return but initiated penalty proceedings u/s 271B on account of delayed filing of the same. In its reply, the

assessee tried to explain delay in the filing of return by stating that its partners were not well educated; that its accountant had left the service and that the chartered accountant had delayed preparation of the audit report. The Assessing Officer did not accept the explanation of the assessee, albeit without assigning cogent reasons and imposed penalty of Rs. one lakh. On appeal the Commissioner of Income Tax (Appeals) (for short, the "CIT(A)") set aside the penalty order. While doing so, he took into consideration the following factors:

"(i) that the partners were by and large, not well educated.

(ii) that the appellant's accountant left the service on March 31, 1985.

(iii) that one of the partners, namely, Shri Sawan Ram, was seriously ill during the period under consideration.

(iv) that the books of account were given to the appellant's chartered accountants in early July, 1985 for tax audit.

(v) that extension applications were filed for extension of date for furnishing the return of income wherein the reason given was that the audit report was awaited."

3. The Commissioner of Income Tax (Appeals) referred to the judgment of the Full Bench of the Gujarat High Court in *Addl. Commissioner of Income Tax, Gujarat Vs. I.M. Patel and Co.*, and held that in the absence of any finding that there was want of reasonable cause on the part of the assessee, the levy of penalty was not justified and that there was no reason for the Assessing Officer to doubt the correctness of the certificate issued by the chartered accountant.

4. The Revenue challenged the order of the Commissioner of Income Tax (Appeals) before the Tribunal, but could not persuade it to restore the penalty imposed by the Assessing Officer. The Tribunal dismissed the appeal vide its order dated January 18, 1994, the relevant portion of which is reproduced below:

"It is not in dispute that the assessee has filed its revised return under the amnesty scheme. It is also not in dispute that the previous year of the assessee ends on March 31, 1985 and as per the provisions of Section 44AB the assessee was required to get its accounts audited and obtain the audit report and file it along with the return before the specified date, i.e., July 31, 1985. It is also not in dispute that the Central Board of Direct Taxes vide first Circular No. 422 dated June 19, 1985 (see [1985] 155 ITR 44) has extended the specified date up to September 30, 1985 in view of the fact that this was the first year of this requirement. In the present case, we find that the assessee had obtained the audit report and filed it along with the return near about two months after the extended date, i.e., on November 29, 1985. The chartered accountant of the assessee has signed this audit report on November 28, 1985. Now the question arises whether the assessee has committed default of statutory provision of Section 44AB in the given facts and circumstances of the case. So far as the provision is concerned, the assessee as per the Board's circular was required to

get its accounts audited and obtain its report and file it up to the extended date September 30, 1985. However, in the present case the same was filed along with the return on November 29, 1985. The question arises whether the provision is mandatory or procedural. In the case of D. K. Jain, Prop. M/s. Luxor Pen Co. v. Deputy CIT (I. T. A. No. 7173/Del/92) vide order dated November 24, 1993, the Appellate Tribunal has held that this provision is procedural. If the assessee had filed the audit report before the assessment is completed, it is a sufficient compliance. Keeping in view the order of the Appellate Tribunal and the decision of the hon"ble Supreme Court in the case of Hindustan Steel Ltd. Vs. State of Orissa, , we are of the opinion that if the assessee gets its accounts audited, obtains audit report and files it along with the return on November 29, 1985, it is a sufficient compliance. Regarding reasonableness of cause for filing the return along with delay, all we would like to mention here is that the assessee has taken two pleas before the Assessing Officer. No. 1 was that the partners of the firm are all not well educated, one of the partners, namely, Shri Sawan Ram was seriously ill during the period under consideration and the assessee's accountant Shri Mulakh Raj left the service on March 31, 1985. Therefore, the assessee had sought assistance of another accountant who could not complete its audit because of non-co-operation of the previous accountant. Lastly, extension applications were filed. If we ignore the first extension application because as per the Central Board of Direct Taxes circular the time was already extended and there is also no proof of second application being filed, we are of the opinion that the reasons given by the assessee before the Assessing Officer for filing the audit report with delay are sufficient, specially when we look into the entire facts and circumstances of the case and the fact that this provision had come for the first time in the statute book in this assessment year. Therefore, we entirely agree with the finding given by the Commissioner of Income Tax (Appeals) specially in view of the decisions of the various Benches of the Tribunal on this point."

5. Shri Rajesh Bindal, learned counsel for the Revenue fairly conceded that there was delay of only one month and 28 days in filing of the return and that the revised return was filed under the amnesty scheme. He also conceded that the Assessing Officer had accepted the return. He, however, justified the levy of penalty by arguing that the Assessing Officer had no option but to do so because the assessee had failed to comply with the mandate of Section 44AB of the Act, inasmuch as, it had filed return on November 29, 1985, without the audit report.

6. We have given serious thought to the arguments of learned counsel for the Revenue. Section 44AB of the Act, which contains the requirement of filing the audit report along with the return and Section 271B (as it stood on 1985) which provides for levy of penalty on account of non-compliance with Section 44AB, read as under:

"Section 44AB. -- Every person, --

(a) carrying on business shall, if his total sales, turnover or gross receipts, as the case may be, in business exceed or exceeds forty lakh rupees in any previous

year, or

(b) carrying on profession shall, if his gross receipts in profession exceed ten lakh rupees in any previous year, or

(c) carrying on the business shall, if the profits and gains from the business are deemed to be the profits and gains of such person u/s 44AD or Section 44AE or Section 44AF (or Section 44BB or Section 44BBB), as the case may be, and he has claimed his income to be lower than the profits or gains so deemed to be the profits and gains of his business, as the case may be, in any previous year, get his accounts of such previous year audited by an accountant before the specified date and furnish by that date, the report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed:

Provided that this section shall not apply to the person, who derives income of the nature referred to in Section 44AB or Section 44BBA, on and from the 1st day of April, 1985 or, as the case may be, the date on which the relevant section came into force, whichever is later:

Provided further that in a case where such person is required by or under any other law to get his accounts audited, it shall be sufficient compliance with the provisions of this section if such person gets the accounts of such business or profession audited under such law before the specified date and furnishes by that date the report of the audit as required under such other law and a further report by an accountant in the form prescribed under this section.

Explanation. -- For the purposes of this section, --

(i) "accountant" shall have the same meaning as in the Explanation below Sub-section (2) of Section 288 ;

(ii) "specified date" in relation to the accounts of the assessee of the previous year relevant to an assessment year, means the 31st day of October of the assessment year.

Section 271B. -- If any person fails, without reasonable cause to get his accounts audited in respect of any previous year or years relevant to an assessment year or furnish a report of such audit as required u/s 44AB, the Assessing Officer may direct that such person shall pay, by way of penalty, a sum equal to one-half per cent. of the total sales, turnover or gross receipts, as the case may be, in business, or of the gross receipts in profession, in such previous year or years or a sum of one hundred thousand rupees, whichever is less."

7. A reading of Section 44AB reproduced above shows that it imposes a duty on every person carrying on business and/or profession to get his accounts audited by an accountant before the specified date and furnish the report of such audit in the prescribed form. Section 271B empowers the Assessing Officer to impose penalty in case the concerned person fails to get his accounts audited in respect

of any previous year or years relevant to an assessment year or to furnish the audit report as per the requirement of Section 44AB. However, there is nothing in the language of that section from which it can be inferred that the levy of penalty is mandatory in all cases of non-compliance with Section 44AB and that in no case, the Assessing Officer can accept the cause shown by the assessee. Rather, the use of the expression "reasonable cause" (this expression was omitted by the Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986) and the word "may" shows that it is only an enabling provision and the Assessing Officer is not under an obligation to impose penalty in each and every case ignoring the explanation given by the assessee or cause shown by it for delayed filing of the return and/or audit report. To put it differently, the Assessing Officer has the discretion in the matter of imposition of penalty and he may not impose penalty if he is satisfied with the explanation given by the assessee for not getting its accounts of the previous year audited by an accountant before the specified date and/or filing thereof along with the return.

8. In *Commissioner of Income Tax Vs. Mussadilal Ram Bharose*, the Supreme Court interpreted Section 271(1)(c) of the Act together with the Explanation added by the Finance Act, 1964 and held (headnote):

"Where the total income returned by the assessee is less than 80 per cent. of the total income as assessed, the Explanation to Section 271 of the Income Tax Act, 1961 shifts the burden to the assessee to show that the difference was not owing to fraud or gross or wilful neglect on his part. This onus is rebuttable. If, in an appropriate case, the Tribunal or the fact-finding body is satisfied on relevant and cogent material on record and draws an inference thereupon that the assessee was not guilty of gross or wilful neglect or fraud, then, in such a case, the assessee cannot come within the mischief of the section and suffer penalty. The conclusion of the Tribunal is a conclusion of fact and no question of law arises."

9. In *Income Tax Officer Vs. Kaysons India*, a Division Bench of this court interpreted the provisions of Sections 44AB, 139 and 271B of the Act and held (headnote):

"Prior to April 1, 1989, the failure to furnish the return of income within the time specified under Sub-section (1) of Section 139 of the Income Tax Act, 1961, attracted penalty u/s 271(1)(a). However, with effect from April 1, 1989, the said provision was omitted and Section 234A was incorporated which provided for a stringent penal interest for the period of such delay. At any rate, whatever lacuna was there in the provisions of Section 44AB or Section 271B has since been plugged by the Legislature by virtue of amendments made in Sections 44AB and 271B by the Finance Act, 1995. A further obligation has been cast on an assessee who is required to obtain the accounts audited u/s 44AB, also to furnish the audit report to the Assessing Officer before the specified date. Similarly, Section 271B has also been amended so as to cover the default of failure to furnish the audit report within the specified time. Prior to the amendment in 1995, there was no requirement to submit the audit report before the specified

date and naturally there was no provision for levy of penalty for failure to submit such audit report u/s 271B. Even after these amendments, Section 44AB does not require filing of such return along with the audit report within the time specified under Sub-section (1) of Section 139 and consequently no penalty for such a default has been provided in Section 271B. Penal provisions have to be construed strictly and penalty can be levied only for the defaults provided therein. Neither can any additional default be read in a provision on the ground of logic nor can a default provided therein be ignored on the ground of hardship."

10. In *Mohan Trading Company and Others and Hari Shankar Shrivastava and Another Vs. Union of India (UOI) and Others*, and *Commissioner of Income Tax Vs. Ramkrishna Stores*, , the Division Benches of the Madhya Pradesh and the Calcutta High Courts held that imposition of penalty u/s 271B of the Act is not automatic and in appropriate case, the competent authority, on being satisfied with the explanation given by the assessee, is free not to impose penalty.

11. In *ITO v. Nanak Singh Guliani*, (2002) 257 ITR 677 (MP) , a Division Bench of the Madhya Pradesh High Court interpreted Section 271B along with Section 44AB of the Act and held (headnote):

"The provision of Section 271B of the Income Tax Act, 1961, makes it clear that the imposition of penalty for non-compliance with the provision of Section 44AB is not mandatory. The word "may" used in that section gives discretion to the Assessing Officer to impose penalty or not to impose penalty. Further, the provision of Section 273B contains a non obstante clause and provides that notwithstanding the provision of Section 271B, no penalty shall be imposable on the person or the assessee, as the case may be, for any failure referred to in the said provision if he proves that there was reasonable cause for the said failure."

12. In *Commissioner of Income Tax Vs. Capital Electronics (Gariahat)*, , a Division Bench of the Calcutta High Court interpreted Section 271B of the Act and held (headnote):

"Section 271B of the Income Tax Act, 1961, inserted with effect from April 1, 1985, began with the phrase "if any person fails without reasonable cause, to get his accounts audited", within the time stipulated, then the concerned Income Tax authority "may direct that such person shall pay by way of penalty", the sum mentioned therein. By the Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986, the phrase "without reasonable cause" was omitted with effect from September 10, 1986. By the said 1986 Act Section 273B was introduced in the Act. This section provides that no penalty shall be imposed u/s 271B if the assessee is able to prove that there was reasonable cause for the said failure. Section 271B mandates imposition of penalty on the failure, but, by reason of the rule of evidence provided in Section 273B, such imposition of penalty is dependent on the proof that there was no reasonable cause for the failure. The omission of the particular phrase from the substantive law and incorporation thereof in the procedural law bears the legislative intent to make

the provision of Section 271B coercive instead of penal. This amendment was intended to remove the scope of any confusion with regard to the characteristics and nature of the proceedings u/s 271B. The word "may" has been used only to accommodate the procedural law enabling the assessee to prove that there was reasonable cause for the failure. Unless it is proved that there was reasonable cause for the failure, there is no escape from the imposition of penalty. Section 271B does not leave any discretion with the authority except as provided in Section 273B. It is only when reasonable cause for failure is proved, that the penalty can be avoided. A combined reading of the two sections does not admit of any theory of absolute default in order to attract the mischief of Section 271B.

The concept that all penalties in civil matters assume quasi-criminal character has of late undergone a change. In fact, the question is dependent on the characteristic of the proceedings. A distinction has to be drawn between the two kinds of proceedings in order to ascertain whether the proceeding is a quasi-criminal one or simply a coercive method to secure compliance of a particular provision. If a penalty provided appears to be a provision for securing compliance by introducing coercive process, it is something implicating a penal interest. If instead of penalty interest was payable, in that event, it would not assume the characteristic of quasi-criminal proceedings. Therefore, the nature of the proceeding has to be examined having regard to the context under which the liability is created. If the liability reveals a civil liability only to ensure compliance through a coercive manner then it is definitely a civil liability without any criminal implication. But as soon as criminal liability is imposed by reason of default in compliance of a particular provision and there is some element of criminality involved in the default, the proceeding can be said to be a quasi-criminal one. The presence of the element of criminality is one of the factors that determines the question.

Section 44AB imposes a liability to get the accounts audited within the stipulated time. There is nothing in the section to make it incumbent to furnish the audited accounts within the stipulated time. Failure to furnish, therefore, will not attract the mischief of Section 271B though failure to get the accounts audited within the stipulated time would attract penalty."

13. The propositions laid down in the aforementioned cases amply support our interpretation of Section 271B of the Act, namely, that it is not obligatory for the Assessing Officer to impose penalty in each and every case and he has the discretion to accept the explanation given or cause shown by the assessee for delayed filing of the audit report.

14. Reverting to the facts of the case in hand, we find that the assessee had filed the return after a delay of one month and 28 days calculated with reference to the specified date, i.e., September 30, 1985. The audit report prepared by the chartered accountant was annexed with the return. Later on, it filed a revised return under the amnesty scheme. The Assessing Officer accepted the return and finalised the assessment. In reply to the penalty notice, the assessee pointed out

that the delay in filing of the return and the audit report was occasioned because its accountant had left service on March 31, 1985; that partners of the firm were not well educated; that one of the partners, namely, Sawan Ram was seriously ill; that the books of account had been given to the chartered accountant in early July, 1985, and extension applications were filed for grant of further time to furnish the return because the audit report was awaited. The Assessing Officer rejected the explanation of the assessee without assigning cogent reasons. The Commissioner of Income Tax (Appeals) accepted the explanation given by the assessee and held that the Assessing Officer was not justified in imposing penalty. The Tribunal concurred with the Commissioner of Income Tax (Appeals) and held that in the absence of a finding that the cause shown by the assessee was not reasonable, the Assessing Officer should not have imposed penalty by invoking his power u/s 271B of the Act. We entirely agree with the Commissioner of Income Tax (Appeals) and the Tribunal that the explanation given by the assessee for delayed filing of the audit report was genuine and bona fide and the Assessing Officer committed a serious illegality by imposing penalty u/s 271B of the Act.

15. In the result, the reference made by the Tribunal is answered in favour of the assessee and against the Revenue.