(2001) 08 CAL CK 0022

In the Calcutta High Court

Case No : Income Tax Reference No. 133 of 1995 6 August 2001 & Income-tax Reference No. 133 of 1995

Commissioner of Income Tax APPELLANT

Vs

Ramkrishna Stores RESPONDENT

Date of Decision : 06-08-2001

Acts Referred:
Income Tax Act, 1961 — Section 271B

Citation : (2001) 253 ITR 175

Hon'ble Judges : Y.R. Meena, J;Arun Kumar Mitra, J

Bench : Full Bench

Advocate : None appeared, for the Revenue D. K. Sharmawith R. K. Chowdhury and C. N. Banerjee, for the Assessee, for the Appellant;

Judgement

On an application u/s 256(1) of the Income Tax Act, 1961, the Tribunal has referred the following questions for the opinion of this court :

"(i) Whether, on the facts and in the circumstances of the case, the Tribunal is justified in law in cancelling the penalties u/s 271B of the Income Tax Act levying Rs. 29,352, Rs. 29,709 and Rs. 48,163 for the assessment years 1985-86, 1986-87 and 1987-88, respectively ?

(ii) Whether, on the facts and in the circumstances of the case, the Tribunal is justified in law in observing and holding that it is impossible to file the audit report within the time stipulated u/s 271B because the specified date of getting the audit report is the same as the due date of filing the return u/s 139(1) of the Act, and making the said observation the basis for cancelling of the penalties ?"

The assessee''s turnover exceed the amount stipulated u/s 44AB of the Act of 1961, in the assessment years 1985-86, 1986-87 and 1987-88. The assessee failed to get the audit report in terms of section 44AB within the specified time. Therefore, the assessing officer initiated the penalty u/s 44AB of the Act for the aforesaid years and imposed the penalty for all these three years. In appeal before the Commissioner (Appeals), the Commissioner (Appeals) gave the reason that penalty u/s 44AB is not automatic and that the accountant of the assessee was ill and ultimately expired in 1988, he cancelled the penalty levied by the assessing officer.

In appeal before the Tribunal, the Tribunal though confirmed the order of the Commissioner (Appeals) but on the ground that it is not possible to file the audit report as required u/s 44AB.

Heard learned counsel for the parties. Learned counsel for the revenue submits that no evidence was produced before the assessing officer for illness of the accountant. He further submits that the reason given by the Tribunal for cancelling the penalty is also erroneous.

Learned counsel for the assessee submits that the accountant was ill since 1982 and expired in 1985. He further submits that in view of the amendment in section 44AB it was made effective from 1-7-1995, by substituting the words "furnished by" for the words "obtained before". He submits that before amendment the furnishing of the audited report was not required. Therefore, if the assessee does not furnish the report along with the return u/s 139 penalty cannot be imposed. He placed reliance on the decision of the Allahabad High Court in the case of Commissioner of Income Tax Vs. Jai Durga Construction Co., .

Considering the submissions though we are not agreeable with the reasons given by the Tribunal that it is impossible to comply the provisions of section 44AB for auditing the accounts, but as the Commissioner (Appeals) has accepted the reasons of illness of the accountant who was ill since 1982 and expired in 1985. The delay is also marginal in filing the audited accounts, i.e., audited account was due to be filed on or before 31-10-1985, the accounts were audited on 5-12-1985, and the return filed on 16-12-1985. For 1986-87, the returns were due on 31-10-1986, and audited on 6-11-1986, and the return filed on 10-6-1987. For 1987-88, the return was due to be filed on or before 31-10-1987, audited on 7-3-1988, and the return filed on 5-4-1988. There is no penalty for filing the return late, i.e., after due date on the ground of illness of the accountant.

Considering these facts, we agree with the view taken by the Madhya Pradesh High Court in Mohan Trading Company and Others and Hari Shankar Shrivastava and Another Vs. Union of India (UOI) and Others, when penalty u/s 44AB is not automatic and if some reasonable cause has been shown if the accounts are not audited on or before due date, no penalty should be imposed.

In the result, we answer question No. 1 in the affirmative, i.e., in favour of the assessee and against the revenue.

Question No. 2, we answer in the negative, i.e., against the assessee and in favour of the revenue.

The reference so made stands disposed of accordingly.

All parties are to act on a signed xerox copy of this dictated order on usual undertaking.

