

(2005) 01 P&H CK 0172
In the Punjab And Haryana At Chandigarh
Case No : IT Ref. No. 107 of 1998

Commissioner of Income Tax

APPELLANT

Vs

S.S. Banga

RESPONDENT

Date of Decision : 17-01-2005

Acts Referred:

Income Tax Act, 1961 — Section 139, 139(1), 139(4), 234A, 256(1)

Citation : (2006) 202 CTR 90

Hon'ble Judges : Viney Mittal, J;G.S. Singhvi, J

Bench : Division Bench

Advocate : Rajesh Bindal, for the Appellant;

Judgement

G.S. Singhvi, J.—On a petition filed by the CIT, Haryana, Rohtak, u/s 256(1) of the IT Act, 1961 (for short, "the Act"), the Income Tax Appellate Tribunal, Delhi Bench "E", New 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 Hon'ble Tribunal was right in law in reversing the order of the learned CIT(A) who confirmed the penalty of Rs. 20,064 imposed u/s 271B of the IT Act, 1961 by the AO?

2. In terms of Section 44AB of the Act, the assessee was required to file a return for the asst. yr. 1993-94 along with the audit report on or before 31st Oct., 1993. However, he filed the return on 8th March, 1994, i.e., after a delay of more than 4 months. While finalising the assessment, the AO issued notice u/s 271B of the Act proposing to impose penalty on account of delayed filing of the audit report. In the reply filed on behalf of the assessee, it was averred that the required report had been obtained well in time, i.e., 27th Oct., 1993 but due to some reasons, the same could not be filed upto 31st Oct., 1993 along with the report. After considering his explanation, the AO imposed penalty of Rs. 20,064. The CIT(A), Faridabad, confirmed the penalty orders and dismissed the appeal filed by the assessee. However, in further appeal filed by the assessee, the Tribunal

deleted the penalty by making the following observations :

As per the facts recorded in the orders of the Revenue authorities, the assessee was required to file the audit report along with the return of income under Sub-section (1) of Section 139 of the Act. The audit report was, however, filed along with the return filed, u/s 139(4) of the Act. The observations of the learned CIT(A) that the assessee led no evidence to show that the audit report was obtained by 27th Oct., 1993, are not based on any solid reasons. In case certain doubts were there the Departmental authorities were free to examine the authenticity of the date on which the report was stated to have been obtained. In the absence of any such evidence available on record, it could not be said that the report was (sic-not) obtained by 27th Oct., 1993 as was the contention of the assessee. In the circumstances, the issue would be covered by the various decisions of the Tribunal, Delhi Benches as cited by the learned Authorised Representative. Respectfully following the aforesaid decision, we would delete the penalty as confirmed by the learned CIT(A).

3. We have heard Shri Rajesh Bindal, learned Counsel for the Revenue, and perused the record. 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 :

Prior to 1st April, 1989, the failure to furnish the return of income within the time specified under Sub-section (1) of Section 139 of the IT Act, 1961, attracted penalty u/s 271(1)(a). However, w.e.f. 1st April, 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 AO 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.

4. 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 an appropriate case, the competent authority, on being satisfied with the explanation given by the assessee, is free not to impose penalty.

5. 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 :

The provision of Section 271B of the IT 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 the discretion to the AO 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.

6. 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 :

Section 271B of the IT Act, 1961, inserted w.e.f. 1st April, 1985, began with the phrase "if any person fails without reasonable cause, to get his accounts audited within the time stipulated, then the concerned IT 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 w.e.f. 10th Sept., 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.

7. In IT Ref. No. 61 of 1995, CIT v. Ashoka Dairy, decided on 7th Jan., 2005 (2006) 200 CTR 211, a Division Bench of this Court, of which one of us (G.S. Singhvi, J.) was a member, interpreted Sections 44AB and 271B of the Act and observed :

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 AO 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 levy of penalty is mandatory in all cases of non-compliance with Section 44AB and that in no case, the AO 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 AO 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 AO 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 view of the law laid down in the aforementioned cases, we hold that the Tribunal did not commit any illegality by setting aside the order of penalty. Consequently, the question referred by the Tribunal is answered in favour of the assessee and against the Revenue.

9. The reference is disposed of in the manner indicated above.