
(2000) 02 P&H CK 0023

In the Punjab And Haryana At Chandigarh

Case No : IT Appeal No's. 39,106,132,133,135 and 139 of 1999 3 February
2000 A.Y. 1990-91

INCOME TAX OFFICER

APPELLANT

Vs

KAYSONS INDIA

RESPONDENT

Date of Decision : 03-02-2000

Acts Referred:

Income Tax Act, 1961 — Section 139, 142, 234A, 260A, 271

Citation : (2000) 163 CTR 75

Hon'ble Judges : N.K. Sud, J;N. K. Sodhi, J

Bench : Full Bench

Advocate : R.P. Sawhney with Rajesh Bindal, for the Revenue B. K Jhingan, for the Assessee, for the Appellant;

Judgement

N. K. Sud, J.

This order will dispose of six appeals bearing ITA Nos. 39, 106. 132, 133, 113` and 139 of 1999 involving common questions of law and facts.

2. The revenue is aggrieved by the order of the Tribunal holding that no penalty u/s 271B was leviable under the Income Tax Act, 1961 (hereinafter referred to as "the Act"). For the sake of convenience, the facts are being taken from Appeal No. 39 of 1999.

The assessee filed its return of income on 31-12-1990, which was accompanied by the audit report, dated 28-10-1990, obtained by it u/s 44AB of the Act. The assessing officer levied the penalty u/s 271B of the Act on the ground that the assessee had failed to file the return along with the audit report on or before the specified date which in this case was 30-11-1990. The assessee preferred an appeal before the Commissioner (Appeals) who cancelled the penalty on the ground that the penalty under the said provision was imposable only if either the accounts are not audited by the prescribed date or the audited accounts are not filed along with the return of income. Thus, according to him, no penalty u/s

271B could be levied for not furnishing the return of income along with the audit report on or before the specified date. The revenue preferred an appeal before the Appellate Tribunal (hereinafter referred to as the "Tribunal") which upheld the order of the Commissioner (Appeals) by following one of its earlier orders in another case. It is against this order of the Tribunal that the revenue has preferred this appeal. u/s 260A of the Act.

3. Shri R.P. Sawhney, learned senior advocate, appearing on behalf of the revenue, contended before us that the Commissioner (Appeals) and the Tribunal were not justified in cancelling the penalty. According to the learned counsel, if the audit report had been obtained within the specified time, then the same ought to have been furnished along with the return of income within the time specified for filing the return under sub-section (1) of section 139 of the Act. According to him, if the assessee were allowed to file the return after the specified date along with the audit report, then the provision of section 44AB requiring the assessee to obtain the audit report before the specified date would become redundant as even those assessees who obtain such report after the specified date can get it antedated and avoid penal consequences.

4. We have heard the learned senior standing counsel for the revenue. To resolve the point at issue, it would be useful to notice the provisions of section 44AB and 271B of the Act as they existed before 1-4-1995

""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,

get his accounts of such previous year audited by an accountant before the specified date and obtain before 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 44AC or 44B or section 44BB of section 44BBA or section 44BBB, 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 obtains before that date the report of the audit as required under such other law and a further report 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" relation to the accounts of the previous year relevant to as assessment year means :

(a) Where the assessee is a company, the 30th day of November of the assessment year;

(b) in any other case, the 31st day of October of the assessment."

"Section 271B-If any person fails to get his accounts audited in respect of any previous year or years relevant to an assessment year or obtain a report of such audit as required u/s 44AB or furnish the said report along with the return of his income filed under sub-section (1) of section 139, or along with the return of income furnished in response to a notice under clause (i) of sub-section (1) of section 142, 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."

5. A plain reading of the aforesaid provisions shows that it provides for penalty in case of following events :

(i) Failure to get the accounts audited in terms of section 44AB ; This would cover cases where either the accounts are not got audited at all or are got audited but after the specified date;

(ii) Failure to obtain report of audit as required u/s 44AB; This would cover cases where the accounts are duly got audited but the audit report on the prescribed form is not obtained before the specified date;

(iii) Failure to furnish the audit report along with the return of income filed under sub-section (1) of section 139; This would cover cases where a return has been filed under sub-section (1) of section 139 and the audit report is not attached therewith ;

(iv) Failure to furnish the audit report along with the return of income furnished in response to a notice under clause (i) of sub-section (1) of section 142. This would cover cases where a notice under clause (i) of sub-section (1) of section 142 is issued to an assessee requiring him to file a return and in response to the same a return is filed without attaching the audit report.

It is, therefore, evident that the default of failure to file the return along with the audit report on or before the specified date is not hit by the provisions of section 271B. It is not the case of the revenue that the assessee has failed to get the accounts audited or has failed to obtain the report of such audit in terms of

section 44AB before the specified date. It is also evident that no return had been filed either under sub-section (1) of section 139 or in response to any notice under clause (i) of sub-section (1) of section 142 and as such there could possibly be no default of not furnishing the audit report along with such a non-existent return. The return under sub-section (1) of section 139 in this case could be filed upto 30-11-1990. However, the assessee had filed the return on 31-12-1990 which was a return filed under sub-section (4) of section 139 and this return was duly accompanied by the audit report obtained by the assessee in accordance with the provisions of section 44AB. Thus, according to us, the default for which penalty had been levied was not covered by the provisions of section 271B and the Commissioner (Appeals) and the Tribunal were justified in holding that no penalty was leviable.

6. Before parting, we would like to observe that the apprehension of the learned counsel that if a penalty u/s 271B was not levied in cases like the one under consideration, an assessee obtaining the audit report after the specified date could escape penalty by getting the audit reports ante-dated cannot be a ground for upholding the penalty which was not otherwise permissible under the law. Prior to 1-4-1989, the penalty for not furnishing the return of income within time specified under sub-section (1) of section 139 attracted penalty u/s 271(1)(a) of the Act. However, with effect from 1-4-1989, the said provision was omitted and a new provision of 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 sections 44AB or section 271B has since been plugged by the legislature by virtue of amendments made in sections 44AB and 271B vide the Finance Act, 1995. In section 44AB a further obligation has been cast on an assessee who is required to obtain the accounts audited under that provision, to also 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 specified time. Thus, it is evident that 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 of the Act. It is clear that 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. There is no gainsaying the fact that the penal provisions have to be construed strictly and penalty can be levied only for the defaults provided therein. Neither any additional default can be read in a provision on the ground of logic nor can a default provided therein be ignored on the ground of hardship. In the present case we are satisfied that a plain reading of section 271B shows that it does not cover the default of failure to file the return along with the audit report on or before the specified date.

In this view of the matter, we find no merit in these appeals which are hereby dismissed. No costs.