

Cit Vs. Bisauli Tractors

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Court : Allahabad

Decided On : May-18-2007

Reported in : (2008)217CTR(All)558; [2008]299ITR219(All)

Judge : R.K. Agrawal and ;Bharati Sapru, JJ.

Appellant : Cit

Respondent : Bisauli Tractors

Judgement :

ORDER

R.K. Agrawal, J.

1. The Income Tax Appellate Tribunal, Delhi has referred the following question of law under Section 256(1) of the Income-tax, Act, 1961 (hereinafter referred to as 'the Act') for opinion of this Court.

Whether the Income Tax Appellant Tribunal was justified in holding that question does not arise of getting the account audited as the assessee was not maintaining any books of account ignoring the fact that Section 44AB is a separate and mandatory provision and has no inter-link with Section 44AA of the Income Tax, Act, 1961?

2. The reference relates to the assessment years 1987-88 to 1989-90.

3. Briefly stated the facts giving rise to the present reference are as follows:

The assessee-firm deals in the sales and purchase of tractors and its spares. During the assessment year 1987-88, assessee has filed its return showing an income of Rs. 32,000. Along with return of income the assessee has not attached any documents, except one challan of advance tax of Rs. 1,500. Assessment was completed under Section 143(3) of the Act. The returns of assessment years 1988-89 and 1989-90 had been filed on 17-3-1990, proceeding of which has been completed under Section 143(1)(a) of the Act. These returns also did not accompany any document, i.e., trading account, profit and loss account and balance sheet, etc. During the course of assessment proceedings, certain queries were raised from Sales Tax Department and from the Escort Ltd. from where the assessee had made purchases of tractors and its spares. The sales of the assessee as per the Sales Tax Department for the assessment years 1987-88 to 1989-90 are as under:

Assessment year 1987-88

Rs. 63,31,508

Assessment year 1988-89

Rs. 1,13,01,855

Assessment year 1989-90

Rs. 1,14,41,807

Since the turnover of the assessee exceeded rupees forty lakhs in each of the three assessment years i.e., 1987-88, 1988-89 and 1989-90, penalty proceedings under Section 271B of the Act were initiated and later on the same were imposed as below:

Assessment year 1987-88

Rs. 31,657

Assessment year 1988-89

Rs. 56,509

Assessment year 1989-90

Rs. 57,290

4. Aggrieved, the assessee went in first appeal before the Commissioner (Appeals), who vide his common dated 27-10-1995 has cancelled the penalty so imposed by the assessing officer for each of the three assessment years on the ground that there were no books of account with the appellant for the above three assessment years and when there were no books of account, the question of their auditing does not arise. Thereafter, the department preferred appeals before the Tribunal. After taking into consideration on the entire conspectus of the case the Tribunal held as under:

I have heard the Learned Departmental Representative and have perused the records. Undisputedly, the assessee is not maintaining books of account. Commissioner (Appeals) verified this fact with reference to sales tax records also. When there are no books of account, the question of their audit does not arise. If there is any fault in the matter, the said fault can be examined with reference to non-maintenance of Books of Account. There are certainly no defaults for not obtaining the said Audit Reports for years under consideration. The requirement of audit is in relation to the books maintained. When there are no books, there is nothing to audit. I have perused the impugned orders. In my opinion the Commissioner (Appeals) took a correct view in the matter and his order calls for no interference.

5. We have heard Sri A.N. Mahajan, learned standing counsel appearing for the revenue. Nobody had appeared for the respondent assessee.

6. Learned standing counsel for the revenue submitted that under Section 44AB of the Act it is obligatory on the part of the assessee whose turnover exceeded the maximum limit in the relevant previous year, to get the accounts audited and failure to do so would make liable such person for penalty as provided under

Section 271B of the Act. According to him non-maintenance of account, as required under Section 44AA of the Act attracts penalty provisions under Section 271A of the Act but that would not take out the jurisdiction of the assessing authority to impose penalty under Section 271B of the Act. The submission is wholly misconceived. Section 44AB of the Act read as follows:

44AB. Audit of accounts of certain persons carrying on business or profession. Every person

(a) carrying on business shall, if his total sales, turnover or gross receipt 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 exceeds 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.

The penalty provisions are contained in Sections 271A and 271B of the Act which are reproduced below:

271 A. Failure to keep, maintain or retain books of account, documents, etc. Without prejudice to the provisions of Section 271, if any person fails to keep and maintain any such books of account and other documents as required by Section 44AA or the Rules made thereunder, in respect of any previous year or to retain such books of account and other documents for the period specified in the said rules, the assessing officer or the Commissioner (Appeals) may direct that such person shall pay by way of penalty a sum of twenty five thousand rupees.

271B. Failure to get accounts audited. If any person fails 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 under Section 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. It may be mentioned here that separate penalty has been provided for non-maintenance of accounts, i.e., under Section 271A of the Act and for not getting the accounts audited and not furnishing the audit report i.e., under Section 271B of the Act. In the present case, the assessing officer did not impose penalty under Section 271A of the Act and instead proceeded to impose penalty under Section 271B of the Act. If a person has not maintained the accounts book or any accounts the question of its audit does not arise. In such an event the imposition of penalty under the provision contained in Section 271A for the alleged noncompliance of Section 44AA may arise but the provisions of Section 44AB does not get violated in case where the accounts have not been maintained at all and, therefore, penal provisions of Section 271B would not apply. It is well settled by the Apex Court in the case of CIT v. Vegetable Products Ltd. : [1973]88ITR192(SC) (SC) that if the language is ambiguous or capable of meanings more than one, then we have to adopt that interpretation which favours the assessee, more particularly so because the provision relates to imposition of penalty. The Constitution Bench of the Apex Court in the case of J.K. Synthetics Ltd. v. CTO : 1994ECR329(SC) has held that penalty provision in a taxing statute has to be strictly construed. Penalty is exigible only where a person falls within the four corners of the penal provisions otherwise not. Further in the tax matter interpretation in favour of the assessee has to be adopted. We may mention here that in case where the returns are not being filed, there is unanimous judicial view that no penalty can be imposed for concealment of income and that is why the Parliament had to make suitable amendment in the penalty provision by inserting Explanation 3 to Section 271 of the Act and Explanation 3 to Section 18 of the Wealth Tax Act, 1957.

8. The question as to whether an assessee has concealed the particulars of his turnover where he has not filed the return came up for consideration before the Apex Court in the case of Narain Das SurajBhan v. CST (1968) 21 STC 104 (SC). The Apex Court while considering the provisions regarding the imposition of penalty provided under Clause (b) of Section 15A(1) of the U.P. Sales Tax Act has held as follows:

In our opinion, Clause (b) of Section 15A(1) is attracted as soon as it is shown that the assessee has concealed the particulars of its turnover or deliberately furnished inaccurate particulars of such turnover in the return filed under Section 7 of the Act. It is manifest that from the grammatical point of view the words 'inaccurate particulars of such turnover' in Clause (b) of Section 15A(1) refer back to Clause (a) where the return under Section 7 is specified. In other words, Clause (b) refers to default in respect of a return furnished under Section 7 and cannot possibly refer to any default in respect of anything done by the assessee in a proceeding under Section 21. As there is no question of furnishing a return of a turnover in a proceeding under Section 21, the assessee cannot be guilty of concealing particulars of its turnover from, or of furnishing inaccurate particulars in a proceeding under Section 21. The concealment or furnishing inaccurate particulars must be in the return furnished under Section 7. Clause (a) of Section 15A(1) deals with the failure of the assessee to furnish the return of the turnover, which he is required to furnish under Section 7 or the failure of the assessee to furnish it within the time allowed or in the manner prescribed. Clause (b) of the Section deals with the concealment or inaccurate furnishing of particulars of the turnover in respect of which the return was required to be filed and which is referred to in Clause (a)?

9. This Court, in the case of *CST v. Shahid Hussain Rakesh Kumar* (1977) 39 STC 520 has held that in a case where no return has been filed penal proceedings can be initiated only under Section 15A(1)(a) and not 15A(1)(b) of the U.P. Sales Tax Act, 1948. It has held as follows:

A perusal of the two parts clearly establishes that Section 15A(1)(a) applies in a case where the dealer has failed to furnish the return under Section 7, where Sub-clause (b) applies in a case where the return has been furnished but there is deliberate concealment or the return furnished is inaccurate. The Legislature has in the two sub-clauses mentioned two different categories and has also laid down different penalties in subclause (c). They deal with different situations, and the Sales Tax Officer in this case proceeded under Section 15A(1)(a) and from the amount of penalty imposed, it is clear that he exercised his jurisdiction under Section 15A(1)(b) and not under Section 15A(1)(a). The language of the Section

clearly indicates that in a case where no return has been filed penal proceedings can be initiated only under Section 15A(1)(a). There are observations in a decision of the Supreme Court in *Narain Das SurajBhan v. CST* which supports the view that we are taking.

10. In the case of *Thoppil Kutti Eroor v. CIT* : [1958]34ITR850(Ker) the Kerala High court while considering the question of imposition of penalty under Section 38(1)(c) of the Cochin Income Tax Act which provides imposition of penalty for concealment or for furnishing inaccurate particulars has held as follows:

It is impossible to say that when a person has failed to furnish any return at all what he has done is to conceal the particulars of income or to deliberately furnish inaccurate particulars of such income within the meaning of Clause (c) of Section 38(1) of the Act. We entertain no doubt that the offence in such a case should be considered as one coming under Clause (a) and not under Clause (c) of Sub-section (1) of Section 38.

11. In the case of *S. Narayanappa & Bros. v. CIT* : [1961]41ITR125(KAR) the Mysore High Court has held as follows:

What was urged before us was that in a case where an assessee has furnished no return at all before the Income Tax Officer, it should be presumed for the purposes of Section 28(1)(b) that he has furnished a return of his income intimating the Income Tax Officer that his income is nil. It seems to me that the language of Section 28(1) does not admit of any such construction since the clear requirement of the provisions of this sub-section is that an assessee on whom a penalty is proposed to be imposed under Section 28(1)(b) should have in the first instance furnished his return. That, in my opinion, is the ordinary and grammatical meaning of the words occurring in the Act. To interpret the language of this provision in the manner suggested by the learned Government Pleader would, in my opinion, be too artificial and too far-fetched to commend itself for acceptance. Although it is true that the provisions of a statute like those contained in Section 28(1)(b) have to receive to construction so as to promote the object of the statute, it is clear that when we interpret a penal provision like that contained in Section 28(1)(b), the interpretation we should place upon it must accord with reason and justice and

must be in accordance with the plain ordinary and rational meaning of the words contained in those provisions. So interpreted, I would not, in my opinion, be right in placing on Section 28(1)(b) the construction for which the learned Government Pleader contends.

12. The Madras High Court in the case *S. Santhosa Nadarv. First Addl ITO* : [1962]46ITR411(Mad) has gone to the extent that a voluntary return filed after the period of four years from the close of the assessment year is not a valid return and such a case should be regarded as if no return has been filed at all and it cannot be said in such a case that there has been a concealment of the particulars of income or deliberate furnishing of inaccurate particulars and Section 28(1)(c) of the Income Tax Act, 1922 would not be applicable. The Madras High Court has held as follows:

When we come to Section 28(1)(c), it deals specifically with the concealment of 'particulars' of income or the deliberate furnishing of inaccurate 'particulars' of income. In the setting in which this sub-section finds place it is impossible to construe Section 28(1)(c) except as relating to a case where a return has been filed but from which return particulars of income have been omitted or any particulars have been deliberately inaccurately furnished. The use of the expression 'particulars of his income' and 'particulars of such income' would be wholly inapposite in a case where no return has at all been filed; such a case would clearly come within the scope of Section 28(1)(a) alone.

13. This Court in *CWT v. Yadu Raj Narain Singh* : [2006]286ITR564(All) also taken the same view. It has held as follows:

Thus applying the strict construction of penalty provisions contained in clause (1) of Sub-section (c) of Section 18 of the Act, we find that prior to the amendment in Explanation 3 by the Direct Tax Laws (Amendment) Act, 1987 with effect from 1-4-1989 in a case where the person who has previously been assessed under the Act does not file any return in response to the notice or even where time for filing the return has expired has not filed any return there cannot be any concealment for which penalty provision can be imposed. In view of the foregoing discussions, we are of the considered opinion that in the present case the respondent assessee

has not concealed the particulars of his income for which wealth no penalty under Clause (1) of Sub-section (c) of Section 18 of the Act is exigible.

14. Therefore, Section 271B of the Act is not attracted in a case where no account has been maintained and instead recourse under Section 271A can be taken.

15. In view of the foregoing discussions we answer the question referred to us in the affirmative, i.e., in favour of the assessee and against the revenue. There will be no order as to costs.

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