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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Jun-26-1989

Reported in : (1989)31ITD55(Delhi)

Judge : D Sharma., P Goradia

Appellant : inspecting Assistant

Respondent : Jhalani and Co.

Judgement :

1. In this appeal directed against the order dated 7-10-1985 passed by the Commissioner of Income-tax (Appeals)-V New Delhi the ground raised is as under : Whether on the facts and in the circumstances of the case, the learned CIT(A) erred in deleting the penalty imposed Under Section 273 amounting to Rs. 2,92,959.

2. The assessee is a registered partnership firm regularly assessed to tax. The relevant facts with regard to initiation of penalty proceedings, material gathered by the assessing officer for the purpose of levy of penalty and quantum thereof can better be appreciated on reading the whole penalty order passed by the Inspecting Assistant Commissioner (Assessment) and, therefore, the same is reproduced :- M/s. Jhallani and Co. filed an estimate in form No. 29 for assessment year 1983-84 on 10-6-1982, estimating the income at Rs. 10,000 and tax payable according to this income at Nil. The assessee filed the return on 18-4-1984 showing total income of Rs. 12,70,740.

The assessment in this case was completed vide order dated 31-12-1984 at total income of Rs. .15,37,923. During the course of the assessment proceedings it was noticed that the assessee had filed wrong estimate and the assessee was asked to explain as to why interest Under Section 215/217 and penalty Under Section 273 should not be levied vide order sheet entry dated 4-12-1984. The representative of the assessee attended on 6-12-1984 but no reply was filed. The matter was discussed in the assessment order and show-cause notice for penalty was issued to the assessee which was served on the assessee on 8-1-1985 as per acknowledgement on record.

The case was fixed for hearing on 22-1-1985 but nobody attended nor any reply has been furnished, so penalty proceedings are decided on merits.

The assessee is having the business of commission agency and commission is received from M/s. Gedore Tools (India) Pvt. Ltd. on the orders booked by the assessee for M/s. Gedore Tools (India) Pvt.

Ltd. The rate of commission is fixed by Company Law Board. There was some dispute regarding commission payable to the assessee but these things were sorted out because of the final order of the Company Law Board passed in October, 1980. Thus at the time of filing the advance tax estimate for assessment year 1983-84, the rate of commission to be allowed to the assessee by M/s. Gedore Tools (India) Pvt. Ltd. was already finalised. The accounting year of the assessee ends on 30-6-1982 and it has been stated that the assessee maintains a record where all the sales on which the commission is receivable by the assessee is recorded. This

register was produced before me for assessment year 1982-83 but for asst. year 1983-84 the assessee has not produced this register. It was confirmed that such a register is maintained vide order-sheet entry dated 6-12-1984. In view of this and in view of the fact that previous year of the assessee ended on 30-6-1982 whereas the estimate has been filed on 10-6-1982 i.e. within 20 days of the close of the year, the assessee could very easily have estimated the amount of commission receivable for the previous year corresponding to assessment year 1983-84. In earlier years the assessee had taken the plea that the correct estimate of income could not be made because the rates of commission were not finalised by Company Law Board and there was a dispute on these points. However, even this factor is absent for assessment year 1983-84. Moreover, the assessee has chosen to file an estimate under Form No. 29 rather than statement of income under Form No. 28A. So, it can be inferred that assessee has consciously estimated the income at Rs. 10,000. In view of the above facts, I hold that the assessee had deliberately filed false estimate of advance tax and it is a fit case for levy of penalty Under Section 273 which is computed as follows :-Total tax demanded 3,90,61175 per cent of the above 2,92,959Advance tax paid Nil ---------- Considering the above facts that the assessee was in a position to estimate this income accurately and the assessee did not file correct estimate of advance tax and considering the huge quantum involved and considering the facts that the payment which should have been made as advance tax has not been made till today. I consider it a fit case for levy of penalty @ 100 per cent of the difference amounting to Rs. 2,92,959.

3. In appeal the assessee challenged the validity of the penalty notice issued on 30-12-1984 on the basis that the penalty proceedings did not specify the default under a particular sub-section of Section 273. The Inspecting Assistant Commissioner (Assessment) who was also present at the time of learning, had submitted orally and also in writing that in assessment order the default committed by the assessee had been clearly stated. Therefore, the notice read together with the assessment order clearly brought out the specific charge. The assessee relied upon decision in the case of N.N. Subramania Iyer v. Union of India [1974] 97 ITR 228 (Ker.) in support of the contention that since the penalty notice was invalid, the proceedings initiated were illegal. This case was distinguished by the Inspecting Assistant Commissioner on the basis that the said case dealt with levy of penalty under Section 18(1) of the Wealth-tax Act and it was not clear from the judgment as to whether specific reasons and details were given in the wealth-tax assessment order for initiating penalty proceeding's and, therefore, the Hon'ble High Court had quashed the penalty proceedings in the absence of any specific remarks in the order. Besides unlike the provisions under the wealth-tax where the penalty is leviable for unrelated defaults, i.e., distinct defaults, the defaults contemplated under Section 273 of the Income-tax Act were inter-related to the advance tax estimate and hence, distinguishable. Again during the course of assessment proceedings also the assessee was asked as to why penalty under Section 273 should not be levied and this is clearly borne out by the record.

4. The CIT (Appeals) in paragraph 11 stated that since on facts penalty order was cancelled it was not necessary to go into the legality of the notice issued under Section 273. Beside in the present case probably the assessee could have made out the nature of default by reference to the assessment order taut such escapes may not always be available to the Assessing Officer.

5. The assessee had filed revised estimate of Rs. 11 lacs plus on 3-12-1982 and, therefore, the penalty could not be levied with reference to the earlier estimate filed in June, 1982, The Inspecting Assistant Commissioner was of the view that such contention is without any substance. However, the CIT (Appeals) in paragraph 10 of the appellate order held that the assessee did file revised estimate in December, 1982 for an amount of Rs. 11,80,000 and even though the revised estimate was not available on record of the Department, yet because of the existence of evidence being acknowledged, it was required to be accepted that the revised estimate was filed. If revised estimate filed is taken into account the difference between the assessed income after appeal effect and the revised estimate came down to less than 25 per cent and, therefore, it could not be said that estimate filed in December, 1982 was false. Hence the penalty was cancelled.

5.1 It appears from the material placed before us that the assessee had also agitated on the ground of quantum of levy of penalty praying that penalty should be reduced to 10 per cent, i.e., the minimum

imposable.

This is clear from the stand taken before the CIT (Appeals) as also from the letters written in writing. Somehow or the other the CIT (Appeals) has not dealt with this aspect.

6. At the time of hearing before us the Departmental Representative supported the order passed by the Inspecting Assistant Commissioner (Assessment). It was emphasised that the assessee had not paid advance tax even after filing the revised estimate before the financial year ended. In any case, the Inspecting Assistant Commissioner had rectified the quantum of advance tax paid as it was found that part of the advance tax payable was infact paid by the assessee.

7. The learned representative of the assessee supporting the order passed by the CIT (Appeals) stated that he had challenged the validity of the notice before the CIT (Appeals) and, therefore, the same was required to be considered. We find that the assessee has not come by way of cross-objection or cross-appeal on this ground. This apart, it is not disputed that the Inspecting Assistant Commissioner (Assessment) has given the appropriate details in respect of the charge on which the penalty proceedings were initiated as were put up before the CIT (Appeals) and, therefore, there should not now be any grievance to the assessee. Again the appellate order if read properly, the CIT (Appeals) has also stated that notice under Section 273 read with the assessment order has salvaged the penalty proceedings from going illegal. We, therefore, do not find any substance in the grievance raised before us.

7.1 It was then stated that provisions of Section 209A were required to be harmoniously considered. On doing so once the revised estimate was filed in December, 1982 the earlier estimate become non-est and, therefore, penalty could not be levied. Besides with regard to quantum it was further submitted that in any case, the penalty should have been restricted to minimum 10 per cent considering the past history of the case.

8. The contention of the assessee that once the revised estimate was filed, the earlier estimate became non-est and, therefore, penalty cannot be levied with reference to earlier estimate, is contrary to provisions of the statute. Section 273(a) and (aa), relevant for the purpose of the controversy, read as under :- (2) If the Income-tax Officer, in the course of any proceedings in connection with the regular assessment for the assessment year commencing on the 1st day of April, 1970, or any subsequent assessment year, is satisfied that any assessee- (a) has furnished under Sub-section (1) or Sub-section (2) or Sub-section (3) or Sub-section (5) of Section 209A, or under Sub-section (1) or Sub-section (2) of Section 212, an estimate of the advance tax payable by him which he knew or had reason to believe to be untrue, or (aa) has furnished under Sub-section (4) of Section 209A or under Sub-section (3A) of Section 212 an estimate of the advance tax payable by him which he knew or had reason to believe to be untrue, or. ...

From the above provisions on plain reading it is quite clear that penalty is exigible for any estimate which is proved to be false, whether it is first estimate or second estimate or revised estimate either on lower side or on higher side. The basic intention is, any estimate filed must not be false on basis of the material at a time when such estimate was prepared and filed. In the present case both the authorities below have given a finding that the first estimate filed was false and, therefore, the penalty was exigible. Indeed, even before us this aspect is not disputed and what is disputed is that once the higher revised estimate was filed subsequently before the last instalment was due, no penalty was contemplated as there could not be any satisfaction of untrue estimate having been recorded with regard to earlier false estimate. In our opinion, the Inspecting Assistant Commissioner has categorically stated that he has levied the penalty for false estimate filed in the month of June, 1982 and this could be the only estimate because the revised estimate was never on the record of the Department and, therefore, even the satisfaction recorded for the purpose of initiation of penalty proceedings was with regard to the estimate filed in the month of June, 1982. Since the penalty could be levied for the false estimate filed earlier, the finding of the CIT (Appeals) that if revised estimate is taken into consideration the difference between the assessed tax, etc. came down with the permissible limit is irrelevant and not germane to the issue raised by the Inspecting Assistant Commissioner (Assessment). The

CIT (Appeals) has misdirected himself in appreciating the case made out by the Inspecting Assistant Commissioner (Assessment). We, therefore, set aside his order and restore that passed by the Inspecting Assistant Commissioner (Assessment).

8.1 With regard to the quantum of the penalty also, we are not agreeable to the prayer of the assessee that on the facts of the case and considering the past assessments, the penalty should be reduced to minimum because we find in the order passed by the Inspecting Assistant Commissioner (Assessment) that the assessee though obliged to file statement of advance tax on the basis of latest completed assessment, it chose to file estimate on lower income estimating only an amount of Rs. 10,000 especially when there was reason to believe that the income could be estimated at much higher rate. We also find that the assessee has not filed any revised estimate even at the time of second instalment due in September, 1982 showing higher income, which could throw some light on the conduct of the assessee. Again the Inspecting Assistant Commissioner has specifically stated that even after filing the estimate the assessee did not make full payment of advance tax as per the revised estimate which again throws ample light on the conduct of the assessee and intentions behind filing the estimate as filed from time to time.