Manish Textiles Vs. Assistant Commissioner of

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : May-30-1991

Reported in : (1991)38ITD365(Mum.)

Judge : U Shah, Vice, M Ajinkya

Appellant : Manish Textiles

Respondent : Assistant Commissioner of

Judgement :
1. The short point for consideration in these appeals by the assessee is whether the assessee is a pucca Arhatia or Kutcha Arhatia (commission agent) and whether the assessee is required to get its accounts audited under Section 44AB of the Income-tax Act. The relevant facts are as follows : 2. The assessee is a registered firm and we are concerned with its assessment for the assessment years 1985-86 and 1986-87. It has been assessed to tax on a total income of Rs. 94,781 for the assessment year 1985-86 and Rs. 1,46,174 for the assessment year 1986-87. Since the assessee had not got its accounts audited under Section 44 AB of the Act, the Income-tax Officer passed orders of penalties under Section 27 1B for an amount of Rs. 53,750 and Rs. 70,770 for the assessment years 1985-86 and 1986-87 respectively. The brief reason for levying such penalties was that the audit report was required to be obtained on or before 30-9-1985 for the assessment year 1985-86 and on or before 30-6-1986 for the assessment year 1986-87. Since such audit report was not filed, the assessee, according to the A.C. had committed default under Section 44AB inviting penalty under Section

271B. After issuing a proper show-cause notice, the Assessing Officer levied aforementioned penalty which worked out to 5% of turnover of the assessee.

3. When the matter went in appeal before the CIT(Appeals), the case of the assessee was that no audited accounts were required to be furnished by the assessee because the assessee was carrying on the business as a commission agent and was mainly acting as sales agents of Power Loom Cloth Manufacturers from whom commission was charged on the sales effected by it, no activity of sales and purchases was carried by the assessee to receive commission income and the assessee claimed deduction in respect of expenses incurred for receiving such income.

Since the assessee was a commission agent (Kutcha Arhatia), it was not required to file audit report under Section 44AB of the Act, particularly, in view of Circular No. 452 dated 17th March, 1968 of CBDT (158 ITR 195 (Statutes). The CIT Appeals forwarded a copy of the assessee's submission to the Assessing Officer. The Income-tax Officer reported that the sales and proceeds were deposited in the assessee's bank first and thereafter there was disbursement to the suppliers. The assessee had complete control over the sale proceeds till the disbursements were made and the issue of sales invoices orpurchases in its own name was not relevant when the funds were within the full control of the assessee. According to the ITO, the goods were first delivered by the supplier and the same were then sent to the buyer. The assessee's expenses also included unloading charges and hamali charges and these activities indicated that the assessee was trading and was not engaged in the business as a commission agent. The CIT (Appeals) accepted this report, she gave a finding that the assessee was obliged to get its accounts audited by the due date for the impugned assessment years and if failed to do the same, it had to pay the penalty which was levied on it. She, therefore, confirmed the penalty orders and hence this appeal.

4. Shri S.N. Inamdar the learned counsel for the assessee argued that the assessee was a commission agent in cloth. The ITO had never given a finding in any of the assessment orders that the assessee was dealing or trading in cloth. The assessee was kutcha arhatia and was all along receiving commission income

and the fact that its business as commission agent was accepted by the department in the assessment orders. The only observation made by the Assessing Officer that the business of the assessee continued to remain the same as in the preceding years. On profit and loss account for the years concerned shown on the right side commission income received against which there was debit for labour, interest, salary etc. The balance-sheet showed that there was no list of letter of credit. The assessee had given details of commission received for both the years which details have been shown in the compilation at pages 6 to 10. The analysis of the assessees account with the State Bank of Bikaner & Jaipur for the year ended 16-6-1984 showed payments to principals on the debit side and the payments receivable from the principals on the credit side. Such details have been filed by Shri S.N. Inamdar for the assessment year 1986-87 in response to the show-cause notice issued. When the Assessing Officer wanted to levy penalty under Section 271B, the assessee in its letter dated 8-3-1990 stated inter alia as follows : Sir, as regards the facts of the case it may be submitted that appellants carry on their business as a commission agent and they mainly act as sales agents of Power Loom Cloth Manufacturers from whom commission is charged on the sales effected by them. From the copy of Profit-and Loss Account enclosed herewith your honours will see that no sales/purchases activities have been carried on by the appellants and on the credit side it is only the receipts of the commission which is shown while on the debit side expenses have been reflected. The Learned Income-tax Officer in the body of assessment order (a copy of which is enclosed herewith for your honours ready reference and records) nowhere has stated that the appellants are carrying on business either as a manufacturer or trader but has only stated "Line of assessee's business continued to remain the same as in the preceding year." He has nowhere also indicated that the appellants were liable for getting their accounts audited as per the provisions of Section 44AB of the Income-tax Act, 1961. Sir, in this regard I respectfully submit the appellants being commission agent (Kutcha Arhatia) in Power Loom Cloth do not fall within the ambit of Section 44AB of the Income-tax Act, 1961. I am enclosing herewith a copy of Circular No. 452 dated 17th March, 1986, issue by the Central Board of Direct Taxes (158 ITR 195 Notifications) wherein in para 4 the Board has clearly indicated that as far as Kutcha Arhatia are concerned, the turnover does not include the sales effected on behalf of the principals and only gross commission has to be considered for the purpose of Section 44AB.He further pointed out that the assessee booked orders on behalf of manufacturers and got the goods delivered to the purchasers. The bills were issued by the sellers directly in the name of purchasers and at no stage either the sale bill or purchase bill was issued by the assessee.

He also pointed out that even in the order levying penalty, the Assistant Commissioner had not stated how the provisions of Section 44AB were applicable in the case of the assessee. Shri Inamdar then, relied on the Board's Circular No. 452 dated 17th March, 1986 on the question of applicability of Section 44 AB in the case of commission agent. The relevant portion of this Circular on which Shri Inamdar relied is as follows : 2 The Board have received representations from various persons, trade associations, etc. to clarify whether in cases where an agent effects sales/turnover on behalf of his principal, such sales/turnover have to be treated as the sales/turnover of the agent for the purpose of Section 44 AB of the Income-tax Act, 1961.

The Board, thereafter, has laid down the various principals of distinctions between kutcha arhatias and pucca arhatias which are as follows :- 3. ...The primary necessity in each instance is to ascertain with precision what are the express terms of the particular contract under considerations. Each transaction, therefore, requires to be examined with reference to its terms and conditions and no hard and fast rule can be laid down as to whether the agent is acting only as an agent or also as a principal.

4. The Board are advised that so far as Kutcha arhatias are concerned, the turnover does not include the sales effected on behalf of the principals and only the gross commission has to be considered for the purpose of Section 44AB....

(i) A kutcha Arhatia acts only as an agent of his constituent and never acts as a principal. A pucca Arhatia, on the other hand, is entitled to substitute his own goods towards the contract made for the constituent and buy the constituent's goods on his personal account and, thus, he acts as a principal as regards his constituent; (ii) A kutcha Arhatia brings a privity contract between his constituent and the third party so that each becomes liable to the other. The pucca arhatia, on the other hand, makes himself liable upon the contract not only the third party but also to his constituent; (iii) Though the kutcha arhatia does not communicate the name of his constituent to the third party, he does communicate the name of the third party to the constituent In other words, he is an agent for an unnamed principal. The pucca arhatia, on the other hand, does not inform his constituent as to the third party with whom he has entered into a contract on his behalf; (iv) The remuneration of a kutcha arhatia consists solely of commission and he is not interested in the profits and losses made by his constituent as is not the case with the pucca arhatia; (v) The kutcha arhatia unlike the pucca arhatia does not have any dominion over the goods; (vi) The Kutcha arhatia has no personal interest of his own when he enters into a transaction and his interest is limited to the commission agent's charges and certain out of pocket expenses whereas as a pucca arhatia has personal interest of his own when he enters into a transaction; (vii) In the event of any loss, the kutcha arhatia is entitled to be indemnified by his principal as is not the case with pucca arhatia.(emphasis supplied) Shri S.N. Inamdar, therefore, argued that in the case of the assessee which was and which has been functioning as kutca arhatia, it was not necessary to get its accounts audited under Section 44AB in view of the aforementioned Circular. The learned Departmental Representative, on the other hand, relied on the orders of the revenue authorities.

5. We have considered the submissions made on both the sides. In our opinion, the CIT (Appeals) has not given proper weight either to the various points of distinctions enumerated in the aforementioned Circular of the Board or to the accounts of the assessee which indicated clearly that the assessee was a commission agent and was never a trader or a manufacturer in goods, and. the balance-sheet for the years concerned do not show any purchases or sales or letter of credit for goods. There is not a whisper that in the assessment order of in the order of penalty about the assessee being a manufacturer or a trader. In fact, a copy of the order of assessment for the assessment year 1988-89 has been placed before us in which the same ITO has inter alia observed that the assessee's business continued to be same as in the last year, viz., commission agency in textiles.

The Assessing Officer has proceeded to state that the details of commission received, expenses incurred etc., have been filed. In view of these facts, we are satisfied that the CIT (Appeals) was not justified in confirming the penalty levied under Section 271B of the Act. The assessee being a kuchha Arhatia was not required to get its accounts audited under Section 44 AB and in not getting such audit report, it has not committed any default punishable under Section 271B.We would, therefore, reverse the order of the CIT (Appeals) and direct that no penalty be levied on the assessee for default under Section 271B.