

Deputy Commissioner of Vs. Bihar State Leather Development

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Court : Income Tax Appellate Tribunal ITAT Patna

Decided On : Jan-24-1996

Appellant : Deputy Commissioner of

Respondent : Bihar State Leather Development

Judgement :

1. This is an appeal, filed by the Department, against an order of the CIT (A), cancelling levy of a penalty under section 271B, amounting to Rs. 84,763.
2. The Assessing Officer (A. O.) found that the turnover of the assessee-company was Rs. 1,69,52,507. Since it exceeded Rs. 40 lacs, there was a mandatory requirement to obtain an Audit Report, as prescribed under section 44AB of the Income-tax Act, 1961. In absence of such a report, a notice was issued to show cause why penalty should not be levied under section 271B of the Act, The assessee replied that as per section 619 (2) of the Companies Act, the Auditor was to be appointed by the Comptroller date or reply, i.e., 13-5-1991. The assessee was, therefore, prevented by sufficient and reasonable cause for not furnishing the Audit Report under section 44AB of the Act. It was stated that a similar penalty, imposed in the case of Bihar State Food & Civil Supply Corporation for Assessment Year (A. Y.) 1985-86, was deleted by the CIT (A) and penalty proceedings had been dropped in the case of Bihar Panchayat Raj Vitta Nigam, Patna. Reliance was placed on some other case law. However, the A. O. was not satisfied. He observed that only some difficulty in getting the accounts audited, as per provisions of section 619 (2) of the Companies Act, had been

pointed out. However, according to section 44AB of the I. T. Act, 1961, the accountant for conducting the audit may be any Chartered Accountant. It was not difficult to get a Chartered Accountant for getting the accounts audited, as provisions of section 44AB, the Chartered Accountant could have been engaged by the assessee itself.

He, therefore, held that no reasonable cause has been established for not having the accounts audited under section 44AB and imposed a minimum penalty of Rs. 84,763.

3. The CIT (A) relied on his predecessor's order in the case of Bihar State Food & Civil Supplies Corporation Ltd., Patna, and cancelled the penalty. The revenue is now in appeal before us.

4. The Id. Departmental Representative (D. R.) submitted before us that the Income-tax Act was a self-contained Code and it was not necessary to go to the Companies Act for appointment of an Accountant for the purpose of audit. He supported the reasoning of the A. O. that even if there was delay in appointment of a statutory Auditor under section 619 (2) of the Companies Act, any other Chartered Accountant should have been appointed independently by the assessee to carry out the audit. He also submitted that there was nothing available on record to show that even the delay in statutory audit under the Companies Act could be attributable, to the Central Government. He, therefore, submitted that the penalty should be restored.

5. The Id. counsel for the assessee, on the other hand, submitted that, no doubt, the Income-tax Act, 1961, was a self-contained Code, but in the second proviso below section 44AB of the Income-tax Act, 1961, there was a recognition of audit under any other law. It was provided that where the assessee has to get his accounts audited under any other law, he may obtain such Audit Report before the specified date and a further report in the form prescribed under section 44AB. In view of this, the assessee was unable to obtain a further report in the prescribed form under section 44AB. In view of this, the assessee was unable to obtain a further report in the prescribed form under section 44AB, since the main audit itself had not been done.

6. The Id. counsel, thereafter, invited out attention to para 5 of the Articles of Association of the Company, according to which, the Company was a Government Company within the meaning of section 617 of the Act.

Thereafter, it was provided in para 77 that the Auditors of the Company shall be appointed by the Central Government on the advice of the Comptroller and Auditor General of India and there remuneration, rights and duties shall be regulated by sections 224 to 233 of the Companies Act. Thereafter, section 619 (2) of the Companies Act came into operation, according to which, the Auditor of a Government Company shall appointed by the Central Government on the advice of the Comptroller and Auditor General of India.

7. The Id. counsel submitted further that being handicapped for want of completion of statutory audit, the return of income had been filed on the basis of an internal Audit Report, a copy of which was available in the paper book. The Report did not contain any date, but it was seen that it had been mentioned in para 3 of the assessment order, the return having been filed on 4-9-1986. Thus, the internal Audit was stated to have been completed before 4-9-1986. In reply to a query from the Bench, the Id. counsel clarified that the internal audit had been done by a Chartered Accountant.

8. The Bench asked the Id. counsel for the assessee on 22-11-1995 for evidence of efforts made by the assessee for appointment of statutory Auditors by the Central Government but inspite of time allowed and the next hearing on 10-1-1996, no such evidence was produced. The Id.counsel explained that it was not possible to produce it.

9. The Bench also invited attention of the Id. counsel to an order of the Tribunal in Income-tax Act No. 588/Pat/1992 for A. Y. 1988-89, dated 14-9-1995, where a penalty of Rs. 1 lac, levied under section 271B of the Act, in case of Bihar State Electricity Board, Patna, had been confirmed by the Tribunal. The Ld. counsel sought to distinguish the decision on facts, stating that in that case the penalty had been confirmed primarily because despite repeated opportunities at the initial stage, no reply had been given to the show-cause notices issued by the A. O. However, in the present case a reply had been given and an extract thereof had

been reproduced in the penalty order itself.

10. Both parties were asked by the Bench regarding the result in appeal, if any, before the Tribunal in the case of Bihar Food & Civil Supplies Corporation Limited, Patna, for A. Y. 1985-86, relying on which the penalty had been cancelled by the CIT (A).

10A. The Id. counsel submitted that for the above reasons, the penalty had been rightly cancelled by the CIT (A) and his order should be confirmed.

11. We have considered the rival submissions carefully. In order to appreciate the dispute before us it will be useful to reproduce the provisions of section 44AB of the Act : (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) 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 ** ** 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 obtain 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.

(i) "accountant shall have the same meaning as in the Explanation below sub-section (2) of section 288;" 12. It is clear that under clause (a) of section 44AB of Act, the assessee was obliged to get his accounts audited by an "Accountant" which has been defined in the Explanation below sub-section (2) of section 288, and includes a Chartered Accountant. It is a self-contained code and as rightly argued by the Id. D. R., and it is not necessary to go into the provisions of the Companies Act in order to implement it. The second proviso below section 44AB only provides an alternative and reduces the rigours of audit where audit has already been conducted under any other law. There is nothing to indicate that the assessee is bound to adopt the alternative course and is helpless if audit under

the other law has not been done or is being delayed. We have noticed that a Chartered Accountant had been done or is being delayed. We have noticed that a Chartered Accountant had been appointed to conduct internal audit which had been completed before the return of income was filed. If a Chartered Accountant could have been appointed for internal audit, we fail to see why one could have appointed for internal audit, we fail to see why one could not be appointed for an audit under section 44AB of the Income-tax Act, 1961. We, therefore, agree with the Id. D. R. that absence of appointment of an Auditor under section 619 (2) of the Companies Act is not sufficient cause for absence of audit under section 44AB of the I. T. Act, 1961.

13. In this connection, it is also relevant to note under section 271B of the act, that failure to get the accounts audited invites penalty.

However, under section 273B of the Act it is laid down that no penalty shall be imposable for any failure of the assessee "if he proves that there was reasonable cause for the said failure". The onus is squarely on the assessee to prove reasonable cause. We hold that in the present circumstances, this onus has not been discharged and the penalty deserves to be restored.

14. There is another reason for restoration of penalty. Even if the assessee wanted to await for statutory audit under the Companies Act, no material has been placed before us to show the efforts made by the assessee for appointment of statutory auditor by the Central Government. The onus under section 273B had, therefore, not been discharged. A similar view was taken by us in the case of Bihar State Electricity Board, Patna, for A. Y. 1988-89 in I. T. A. No. 588/Pat.

/1992 dated 14-9-1995 and relevant extract is given below : "9. We are also not satisfied with the explanation gives before the CIT (A) and before us. It is laid down in section 273B of the Act that no penalty shall be imposable on the assessee for any failure as mentioned in section 271B of the Act "if he proves that there was reasonable cause for the said failure". Thus, the onus lies squarely on the assessee to lead evidence that there was reasonable cause for the said failure". Thus, the onus lies squarely on the assessee to lead evidence that there was reasonable cause for the failure. Mere repetition that the audit report was

given late by the Accountant General, Bihar, is certainly not adequate. The assessee has not led any evidence to show that the delay was attributable to the Accountant General, Bihar, and not to the assessee. The manner in which statutory notices issued by the A. O. regarding imposition of penalty, were ignored by the assessee, does not inspire confidence that the requirements of the Accountant General, Bihar, would have been complied with for the purpose of audit.

10. In any case, the Id. counsel has fairly conceded before us that even the audit Report, given in February '90, can not be called a report under section 44AB of the Act.

11. In the circumstances, we hold that the assessee has not proved that there was reasonable cause for the failure to get the accounts audited. The penalty of Rs. 1,00,000 sustained by the CIT (A), is hereby confirmed." 15. There is yet another reason for not agreeing with the order of the CIT (A), who has relied on an order of his predecessor in case of M/s.

Bihar State Food & Civil Supplies Corporation, Patna, for A. Y.1985-86, cancelling penalty under section 271B. We find that this order was reversed by the Tribunal in I. T. A. 502 (Pat.)/1989 dated 22-8-1994 and the penalty of Rs. 1 lac was restored in the following words. : "7. We have considered the rival submissions carefully. After perusing the CBDT Circular No. 422 dated 19-6-1985 we agree with the Id. D. R. that the instructions are not applicable to the assessee since the audit report was not obtained by 30th September, 1985. We will however, proceed to consider whether there was a reasonable cause otherwise as held by the CIT (A). In this regard we find that the scheme of audit for public sector undertakings has not been fully kept in view by the AO or the CIT (A). The public sector undertaking undergoes a statutory audit by a prescribed firm of CAs for the purpose of compilation of accounts and preparation of the profit and loss account and the balance sheet. Returns should be filed on the basis of such audited accounts Subsequently, the accounts are audited by officers of the office of the Comptroller and Auditor General of India. This is a second audit and the filing of returns do not have to wait for their completion. The distinction between two kinds

of audit has not been kept in view. It will be apparent that correspondence with the Comptroller and Auditor-General would be for the purpose of second audit and would, therefore, not be relevant for our present purpose. This was duly pointed out to the Id. counsel for the assessee by the Bench No further explanation was forthcoming the delay in statutory audit.

There is nothing to show whether the delay was on account of the delay in preparation of preliminary accounts by the assessee or whether the delay was attributable to the statutory auditors. The facts were in the knowledge of the assessee only in this regard and not the Assessing Officer. The onus, therefore, lay on the assessee to lead the necessary evidence. However, this has not been done. In the facts and circumstances of the case, we hold that the assessee had failed to get the accounts audited within the prescribed time without reasonable cause. The penalty of Rs. 1,00,000 levied by the AO is restored. The department's appeal is allowed." 16. Consistent with out earlier view we hold that here also the penalty deserves to be restored.

17. For the above reasons, the penalty of Rs. 84,763 imposed by the A.O., is hereby restored and the Departmental appeal is allowed.

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