

Dy. Cit Vs. the Co-operative Stores Ltd. (Super Bazar)

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Court : Delhi

Decided On : Jul-25-2001

Reported in : (2002)74TTJ(Del)46

Appeal No. : ITA Nos. 4960 & 4961/Del/1994 A.Y. 1985-86 25 July 2001

Appellant : Dy. Cit

Respondent : The Co-operative Stores Ltd. (Super Bazar)

Advocate for Pet/Ap. : Naveen Gupta, for the Revenue; R. Santhanam, for the assessee

Judgement :

ORDER

Sikander Khan, A.M.

These two appeals have been filed by the revenue, Both relating to assessment year 1985-86. In ITA No. 4960/Del/1994 the revenue has contested the cancellation by the learned Commissioner (Appeals) of the penalty levied under section 273(1)(a) of the Income Tax Act, 1961. The assessed filed return declaring total income of Rs. 73,77,347. Assessment was however completed on total income of Rs. 96,93,478. It had filed estimate of advance tax in Form No. 28A on 15-6-1984, showing income of Rs. 20 lakhs. Its accounting year ended on 30-6-1984. Penalty proceeding under section 273(1)(b) of the Act was initiated. However, finally the penalty was levied under section 273(1)(a) of the Act.

2. In reply to the show cause the assessed submitted before the assessing officer that penalty under section 273 was not attracted in the case as there was reasonable cause for furnishing lower estimate. The following reasons were furnished for the lower estimate :

'The reason for substantial difference in the returned estimated income and assessed income was on account of the fact that assessed has earned a sum of Rs. 40.16 lakhs from non-trading activities. Amount of non-trading income pertains to commission from consign, show window and miscellaneous activities carried on during the year. The income of such activities could not be estimated as firstly certain terms and conditions were settled at the end of the year, secondly the store was decentralised with about 87 branches at different corners of Delhi and whole accounts were maintained manually. thereforee, it was not only difficult but impossible to arrive at the income of all branches before the end of the financial year.'

3. The assessing officer was not satisfied and convinced with the aforesaid submissions and contentions. He observed that since the estimate was filed on 15-6-1984, i.e., near to the close of the accounting year, the assessed could have taken into account the income of Rs. 40.16 lakhs for non-trading activities as mentioned in its Explanationn reproduced above. He further observed that in view of the nature of the default the appropriate action applicable for the default was section 273(1)(a) and not section 271B and thereforee, the penalty proceeding was not initiated and the penalty could not be levied under section 273(1)(a) of the Act. With these observations, the assessing officer levied the impugned penalty of Rs. 1,98,590.

4. Aggrieved the assessed preferred first appeal before the learned Commissioner (Appeals). After considering the submissions and contentions made before him, the learned Commissioner (Appeals) cancelled the penalty. He observed as under :

'I find merit in the contention of the assessed. On going through the facts of the case, I find that the provisional return filed for assessment year 1984-85 formed the basis for filing of the estimate/statement of advance tax for the subsequent

assessment year as no assessment pertaining to assessment year 1984-85 was completed till that time and the actual incomes from different branches were not received by the assessed up to the time of filing of the estimate. For assessment years 1983-84 & 1982-83 the assessments were not completed before filing of the statement/estimate of advance tax for assessment year 1985-86. As the assessed had not received the exact income from different branches, there was no other basis available with the assessed for filing of the statement/estimate of advance tax. So, no deliberate motive can be attributed to the assessed for filing of an estimate though there was enormous difference between the income shown in the revised return and the estimate of advance tax. As penalty is livable only if it is proved that on the date of filing of the estimate the assessed had full knowledge that an incorrect estimate was being filed and no such motive is clear in case of the assessed. I deem it proper to direct the assessing officer to delete the penalty imposed.'

5. Aggrieved the revenue has come up in second appeal before this Tribunal.

6. After considering the materials on the file, we are of the view that on the facts and in the circumstances of the case and for the reasons given in the impugned appellate orders, the learned Commissioner (Appeals) was justified in cancelling the penalty. No material was brought before us to show that on the date of filing of the estimate, the assessed had full knowledge that incorrect estimate was being filed. No materials were filed before us from the books of accounts to show that on the date of filing of the estimate, the books of accounts showed income higher than the estimate. It will be seen from the assessee's Explanation furnished before the assessing officer reproduced above the income of Rs. 40.16 lakhs for non-trading activity could be estimated at the end of the year after the settlement of the terms and conditions with the parties. No materials were brought before us by the revenue to rebut these Explanationns of the assessed and to prove that on the date of filing of estimate the terms and conditions had already been settled and the said income of Rs. 40.16 lakhs for non-trading activity was known and was within the knowledge of the assessed. Penalty cannot be levied merely on general grounds without bringing specific material and mentioning specific reasons for rejecting the Explanationn. We are of the view that the revenue has failed to make

out a case of deliberate default or filing of an untrue estimate knowingly by the assessed. Penalty under section 273(1)(a) can be imposed only where the assessed had furnished under clause (a) of sub-section (1) of section 209A(a), a statement of the advance tax payable by him which he knew or had reason to believe to be untrue. Here in the present case revenue has failed to make out a case that the assessed knew or had reason to believe at the time of filing of an estimate that the estimate was untrue.

7. In the above view of the matter, we hold that penalty under section 273(1)(a) was not exigible in the case and the learned Commissioner (Appeals) was justified in cancelling the penalty.

8. In the result, the revenues appeal is dismissed.

9. In ITA No. 4961/Del/94 the revenue has contested the cancellation by the learned Commissioner (Appeals) of the penalty of Rs. 86,482 levied by the assessing officer under section 271(1)(c) of the Act. The assessed filed return declaring income of Rs. 73,27,347 but the assessment was completed on total income of Rs. 96,93,478. The addition to the returned income included addition of Rs. 1,92,183 on account of dividend which was omitted by the assessed in the computation of income attached to the return. Penalty proceeding under section 271(1)(c) was initiated.

10. In reply, to the show cause, the assessed submitted before the assessing officer that it is a public co-operative society meant for rendering services to the public with no profit motive, and therefore, the allegation of concealment of income was unjustified and wrong. It was stated that the omission of the dividend income in the computation of total income was unintentional. It was, therefore, contended that penalty under section 271(1)(c) was not livable in the case.

11. The assessing officer was not satisfied and convinced with the aforesaid submissions and contentions. He levied the impugned penalty under section 271(1)(c) of the Act.

12. Aggrieved the assessed preferred first appeal before the learned Commissioner (Appeals) who cancelled the penalty. He observed as under

'On going through the submissions made before me, I find that the assessee's case is squarely covered by the decision of the Karnataka High Court in case of Mahadevasara Moves v. CIT : [1983]144ITR127(KAR) . The amount of dividend income was reflected in the profit & loss account but due to oversight the same was not reflected in P&L; Appropriation a/c. In the statement of income filed by the assessed Along with the return, the assessed started from net profit as per profit & loss Appropriation account and added all the components of income, but only dividend income could not be added. This cannot be taken as willful deliberate attempt on the part of the assessed because the assessing officer has not brought any material to the penalty order to show that the assessed had acted with a contumacious motive to hide or cancel a part of its income. Though the assessed had not filed a revised return before the assessing officer in accepting the dividend income, the addition of such income was accepted by the assessed and tax was paid on the same. therefore, no conscious effort can be attributed to the assessed for such type of omission. As the omission of dividend income is a genuine income on the part of the assessed without any motive. I delete the penalty imposed in relation to the dividend income.'

13. Aggrieved the revenue has come up in second appeal before this Tribunal.

14. After hearing both the sides and considering the materials on the file, we are of the view that on the facts and in the circumstances of the case and for the reasons given in the impugned appellate order the learned Commissioner (Appeals) was justified in cancelling the penalty levied by the assessing officer under section 271(1)(c) of the Act The learned Commissioner (Appeals) noted that the dividend income was reflected in the profit & loss account. From this he concluded that its omission in the computation of total income filed with the return was unintentional and without mala fide motive and hence it was not a case of concealment of income. He rightly observed that in terms of the Karnataka High Court decision in the case of Mahadevasara v. CIT : [1983]144ITR127(KAR) . The omission was incidental and inadvertent mistake for which penalty under section 271(1)(c) could

not be levied.

15. In the above view of the matter, we uphold the order of the learned Commissioner (Appeals) and dismiss the revenues appeal.

16. In the result, both the appeals filed by the revenue are dismissed.

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