IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.02.2020

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE R.SURESH KUMAR

Tax Case (Appeal) No.829 of 2010

S.Banumathi ..Appellant

vs.

The Assistant Commissioner of Income Tax,
Circle II,
Coimbatore ..Respondent

Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Chennai "A" Bench, dated 22.5.2009 in ITA No.779/(Mds)/07 as against the Order of the Commissioner of Income Tax (Appeals)-I, Coimbatore made in appeal No.155/06-07dated 4.1.2007 in Pan No.AAQPB5073J for the Assessment year 2004-05.

For Appellant : Mr.R.Venkatanarayan

For respondent : Ms.K.G.Usha Rani,
Junior Standing Counsel

JUDGMENT
(Delivered by DR.VINEET KOTHARI, J.)

The Assessee Tmt.S.Banumathi has preferred this appeal under Section 260A of the Income Tax Act, 1961, arising from the order of the learned Income Tax Appellate Tribunal, "A" Bench, dated 22 May 2009, whereby, the learned Tribunal upheld the imposition of penalty under Section 271B of the Income Tax Act, 1961 on account of the failure of the Assessee to get her accounts audited as required under Section 44AB of the Act because turnover of the Assessee according to the Revenue Department exceeded the prescribed limit of Rs.40 lakhs. The present appeal was admitted by a Coordinate Bench of this Court on 31 August 2010 with the following two substantial questions of law :-

> "(i) Whether on the facts and in the circumstances of the case the Tribunal was right in holding that the appellant has violated the provisions of Section 44AB

and hence penalty is leviable under Section 271B of the Act?

(ii) Whether on the facts and in the circumstances of the case the Tribunal was justified in not appreciating that the appellant had reasonable and sufficient cause for not getting the accounts audited and hence by virtue of section 273B penalty cannot be imposed?”

2. The learned counsel for the Assessee relying upon the decision of the Rajasthan High Court in the case of Bajrang Oil Mills vs. Income Tax Officer, 2007(295) ITR 314 (Raj), submitted that the Assessee bona fide believed that the three components of the receipts of the Assessee during the year in question were not included in the 'turn-over' as defined in Section 44AB of the Act, wherein the prescribed limit of Rs.40,00,000/- was given. She had the following receipts during the year in question.

	Amount in Rs.
Sales A/c	34,11,147
Commission	9,66,184
Contract labour	8,66,677
	52,43,008

3. The learned counsel for the Assessee urged that since the turnover of the goods dealt with by the Assessee viz. the refrigerators were only to the extent of Rs.34,11,147/-, she believed that the commission income earned separately by the Assessee and job works done for repairs etc. represented the labour receipts. The said two components were not includible in the definition of 'turnover', requiring the Assessee to mandatorily go for the audit under Section 44AB of the Act. He submitted that not undertaking the audit procedure did not affect the Revenue at all, since due tax on the disclosed income was paid by the Assessee, which has been accepted in the assessment order and therefore, the imposition of penalty under Section 271B of the Act in these circumstances was not justified as the Assessee had a bona fide belief and raised a bona fide contention before the authorities below that the aforesaid two components in the form of commission and job work receipts were not includible in the definition of 'turnover' to determine the limit of Rs.40 lakhs.

4. The learned counsel relied upon the decision of the Rajasthan High Court in Bajrang Oil Mills, in which the Division Bench of the Rajasthan High Court has held that bona fine belief of the Assessee that job work receipts did not form part of the turnover for the said limit of Rs.40 lakhs

was a bona fide contention and the imposition of penalty under Section 271B of the Act was not justified in those circumstances. The relevant portion of the judgment of the Rajasthan High Court, relying upon the decision of the Supreme Court in the case of Hindustan Steel Ltd. vs. State of Orissa [1972] 83 ITR 26 (SC) are quoted below for ready reference:-

> The Assessee filed its return for the Assessment year 1994-95. Since the gross receipt of the Assessee from the sales and the job work done by it exceeded Rs. 40 lakhs, the Assessing Officer opined that the assessee was under an obligation to get the accounts audited. The Assessee contended that it was not under obligation to get its account audited. The Assessing Officer rejected the contention and levied penalty under Section 271B. This was confirmed by the Commissioner of Income Tax (Appeals) and the Tribunal. On appeal to the High Court :
>
> Held (i) that the Assessee was required to get its accounts audited as its gross receipts had exceeded Rs.40 lakhs during the previous year relevant to the assessment year 1994-95. However, sub-section (9) of Section 139 could not be invoked.
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> (ii) That the fact that the High Court had found that the interpretation of Section 44AB is a substantial question of law requiring consideration by the Court prima facie suggests that the interpretation of section 44AB was not self evident and needed an examination of the provisions of Section 44AB. The Assessee was under a bona fide belief that it did not have to get its accounts audited. Moreover for the subsequent years when the total turnover from its business of manufacture was more than the prescribed limit the Assessee had subjected its accounts to audit and was complying with the provisions of Section 44AB regularly. Therefore, levy of penalty under Section 271B for non compliance with section 44AB for the assessment year 1994-95 could not be sustained.

5. On the other hand, the learned counsel appearing for the Revenue supported the impugned order and urged that since the Assessee did not get the accounts audited, the authorities

below, including the Tribunal, were justified in imposing the penalty in question. The learned counsel submitted that the decision in Bajrang Oil Mills was distinguishable as the penalty in the said case was set aside mainly on account of breach of the principles of natural justice whereas in the present case, the Assessee was given due opportunity of hearing before the concerned authorities.

6. The provision of Section 271B of the Act as well as Section 44AB of the Act to its relevant extent are quoted below for ready reference :-

> Section 44AB:-
>
> 44AB. Every person,—
>
> (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
>
> get his accounts of such previous year [***] audited by an accountant before the specified date and [furnish by] 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.
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> Section 271B:-
>
> 271B. 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.]

The limit of Rs.40 lakhs was increased to Rs.60 lakhs with effect from 1 April 2011 and later to Rs.One crore, with effect from 1 April 2013. However, we are concerned with the Assessment Year 2004-05.

7. Having heard the learned counsel for the parties, we are of the opinion that the imposition of penalty under Section 271B of the Act gives a discretion to the concerned

Assessing Authority for imposition of penalty. The provisions of Section 44AB of the Act were introduced on the statute book with effect from 1 April 1985. Though the said provision had existed on the Statute Book for a considerable period before Assessment Year 2004-05 with which we are concerned, it appears that the Assessee, a small trader, entertained a bona fide belief that the commission receipts and receipts from the job work were not part of the turnover to be computed for Rs.40 lakhs, requiring a compulsory audit by an independent Auditor under Section 44AB of the Act.

8. It is not in dispute that the requirements of audit does not have a tax effect at all and the requirement of audit has been imposed by the Legislature to ensure that the Books of Accounts of the Assessee are maintained in a proper manner and reflect truly, the transactions done by it, which facts are verified by an independent Auditor, who is a qualified Chartered Accountant.

9. The contention of the Assessee in the impugned penalty proceedings has been throughout that the turnover of the goods sold by her during the year were below Rs.40 lakhs at Rs.34 lakhs. But the other receipts during the year, namely the Commission and job work or labour receipts for maintenance works, were not part of the turnover and therefore, the requirement of Audit was not attracted. Such a contention on the part of the Assessee could be a bona fide contention as well, and no mens rea can be attributed to the Assessee for raising such a contention before the authorities below.

10. The Division Bench of the Rajasthan High Court in the set of facts, where the job work charges were not included in the turnover and on that basis, the Assessee contended that the requirement of audit was not attracted, the Division Bench set aside the penalty in question under Section 271B for the Assessment Year 1994-95, following the Hon'ble Supreme Court decision in the case of Hindustan Steel Ltd. vs. State of Orissa [1972] 83 ITR 26 (SC) in which principles of mens rea for imposition of such penalties were propounded by the Hon'ble Supreme Court. The relevant portion of the Rajasthan High Court decision placing reliance on the said judgment of the Hon'ble Supreme Court, is quoted below for ready reference:-

> 59. It may also be noticed that for the reason that the accounts are not audited where Section 44AB is attracted it does not affect the proper computation of income in terms of provisions of Act of 1961 nor does it affect any claim to any deduction by the assessee under any provisions of the Act. In such event the

> breach remains a technical breach of the procedural requirement. The conduct of the assessee cannot be said to be lacking in bona fide or of gross negligence when he raised issue about the interpretation of a provision which had used multiple expressions, construction of which cannot be said to be self-evident but needed interpretorial exercise. Because ultimately on construction of statute the stand taken by the assessee is found to be wrong, it does not become a case of 'self-evident' interpretation, impinging on conduct of assessee. Even in the absence of provisions like Section 273B, which aptly governs the present case, the ratio of Supreme Court decision in Hindustan Steels Ltd. (supra), keeping in view the object of provisions of mischief it was intended to suppress.
>
> Therefore, levy of penalty in the aforesaid circumstances under Section 271B for non-compliance of Section 44AB regarding asst. yr. 1994-95 cannot be sustained.
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> As a result, the appeal is allowed. The order of the Tribunal as well as the order of the CIT(A) and AO levying penalty against the assessee under s.271B are set aside. There shall be no orders as to costs and the penalty is quashed.

11. In the facts and circumstances of the present case also, we are satisfied that the imposition of penalty in the present case was not justified and the Assessee raised a bona fide contention with regard to the requirement of audit under Section 44AB of the Act. Merely because such a contention was not accepted by the Revenue Authorities, it could not per se attract the imposition of penalty under Section 271B of the Act. The discretion vested in the authority concerned ought to have been exercised fairly and objectively. The fact that it did not have any adverse tax effect on the revenue collection by the Department is another factor which ought to have been taken into account. Therefore, in these circumstances, we are inclined to answer the questions framed in favour of the Assessee and against the Revenue and allow the present appeal of the Assessee. We hereby do so.

12. In the result, the Appeal is allowed. No costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To

1. The Assistant Commissioner of Income Tax,
Circle II, Coimbatore.

2. The Commissioner of Income Tax (Appeals)-I,
Coimbatore.

SPD(CO)
EU 6.7.2020

T.C.A.No.829 of 2010