Court No. - 37/Reserved

Case :- INCOME TAX REFERENCE No. - 42 of 1999

Petitioner :- E.E. Minor Irrigation Banda
Respondent :- C.I.T. Kanpur
Petitioner Counsel :- S.P. Kesharwani
Respondent Counsel :- B.J. Agarwal

Hon'ble Prakash Krishna, J.
Hon'ble Subhash Chandra Nigam, J.

(Delivered by Prakash Krishna)

The Income Tax Appellate Tribunal, Allahabad Bench, Allahabad has referred the following question under Section 256 (1) of the Income Tax Act, 1961 for opinion of this Court:-

> *"Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was legally justified in confirming the penalty imposed u/s. 272 A (2) (c) of the I.T. Act, 1961 for the delay in furnishing the annual returns of deduction of tax at source, prescribed u/s. 206 of the Act, when the expressions used in the proviso to section 272A (2) are tax "deductible" or "collectible" and the tax required to be deducted at source had already been deducted and deposited in time in the Government account."*

The dispute relates to the financial years 1990-1991, 1993-1994 and 1994-1995.

Executive Engineer was the prescribed person, as per Section 206 of the Income Tax Act, responsible for furnishing within the prescribed time the returns regarding tax deducted at source under Section 194-C of the Income Tax Act, in Form No.26 C prescribed under Rule 37 of the Income Tax Rules, 1962. There was, admittedly, a delay of 1645, 550 and 214 days in furnishing the returns for the financial years 1990-91, 1993-94 and 1994-95 respectively. The Assessing Officer did not find merit in assessee's

contention that he was regularly deducting tax at source and remitting it to the Government Account. In the absence of any satisfactory explanation for the delay in submission of the annual returns, penalty of Rs.35,818, Rs.55,000/- and Rs.21,300/- as per the prescribed scale, was imposed u/s.272 A (2) (c) of the Income Tax Act for the financial years 1990-91, 1993-94 and 1994-95 respectively. In appeal, the Commissioner of Income Tax (A) did not agree with the assessee that since as per proviso to section 272 A, inserted by the Finance Act, 1991 with effect from 1.10.1991, penalty is not to exceed the amount of tax "Deductible" or "Collectible" and nothing remained to be "deducted" or "collected" in his case, no penalty was exigible. The penalties imposed by the Assessing Officer were confirmed.

In appeal before the Tribunal, the contention of the assessee was two-fold. The first plea was that the delay in filing the return was on account of ignorance of law.

The other plea was that since there was no tax deductible or collectible, in view of proviso under Section 272 A (2), no penalty could be imposed.

None of the above submissions did find favour with the Tribunal. The Tribunal confirmed the levy of penalty.

Heard Sri S.P. Kesarwani, learned counsel for the applicant and Sri A.N. Mahajan, learned standing counsel for the department. The learned counsel in support of the reference submits that there is no loss of Revenue in the present case. The tax was deducted and was deposited within the statutory time. The only default on the part of the assessee is that the returns were not filed within the prescribed period of time. Elaborating the argument, he submits that the assessee is an instrumentality of State or a government officer wherein the officers have no personal interest and as such the delay in late filing of the return should not have been attracted the penal clause and the power not to levy the penalty on sufficient cause being shown, being vested with the Income Tax Authorities, the penalty order is liable to be set aside. In reply, Sri A.N. Mahajan, learned counsel for the department,

does not dispute that the tax deducted at source was deposited within the prescribed period. However, he submits that non filing of the return within the prescribed period is sufficient to attract the penal provision. A bare perusal of the penalty order for the financial year 1993-94 would show that the penalty has been levied only on the ground that the annual return in the prescribed form was due on or before 30th of June, 1994, whereas the same was filed on 22nd of January, 1996 which is late by 550 days. The facts situation in respect of other financial years is also the same except the period of delay with which the returns were filed. The explanation given by the prescribed person, Executive Officer, was that he was not aware about the filing of the return. The said explanation has not been accepted by any of the authorities below. It may be so, but while upholding the order of penalty the Tribunal should have taken into consideration the attending facts and circumstances of the case, such as, that the prescribed person is an Executive Engineer, a government servant. In such matters, the government servants have no personal interest. The Tribunal has also lost the sight of the fact that there is no loss of Revenue to the department and there is no unlawful gain to the assessee. Section 273 B of the Act provides that penalty be not imposed in certain circumstances and one of the circumstances is that if the person concerned proves that there was reasonable cause for the failure of action or omission for which the penalty proceedings were initiated.

It may be noted that Section 272 A (2) is also one of the Sections which finds mention in Section 273 B of the Act.

Taking into consideration the ground realities of life and the attending facts and circumstances of the case, coupled with the fact that there is no loss of Revenue whatsoever, the Tribunal was not justified in holding that there was no reasonable cause for non filing of the return within the prescribed period. The requirement of filing of the return in the facts of the present case, is more or less a ministerial job.

The very idea of making a provision that on sufficient cause

being shown, the penalty may not be levied, is indicative of the fact that the said penal provision has been enacted to ensure the compliance of the provisions of the Act and not with a view to punish. Where there is no loss of revenue in the sense that the tax deducted at source has been deposited within stipulated period, mere late filing of the return by itself is not sufficient to levy penalty. In such matters, penalty should not be levied for late filing of the return. This aspect of the matter was not appreciated by the Tribunal. The Tribunal ought to have considered as to whether there is material on record to show that there was sufficient cause for not filing the return within the stipulated period.

In view of the above discussion, we are of the opinion that in the present case there was no justification for passing a penalty order for late filing of the return with respect to the tax deducted at source and deposited within stipulated period. We, therefore, answer the question referred to us in negative i.e. in favour of the assessee and against the department.

No order as to costs.

(Prakash Krishna, J.)

(Subhash Chandra Nigam, J.)

Order Date :- 17.12.2009
LBY