A.F.R.
JUDGMENT RESERVED ON 17.7.2013
JUDGMENT DELIVERED ON 19.8.2013

Case :- INCOME TAX APPEAL No. - 460 of 2009

Appellant :- The Commissioner Of Income Tax And Another
Respondent :- M/S Gail (India)Ltd.
Counsel for Appellant :- A.N.Mahajan
Counsel for Respondent :- Shubham Agrawal

Hon'ble Sunil Ambwani,J.
Hon'ble Surya Prakash Kesarwani,J.

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

This appeal has been filed by the revenue under Section 260A of the Income Tax Act 1961 (hereinafter referred to as the 'Act') against the judgment and order dated 23.4.2009 passed by the Income Tax Appellate Tribunal, Agra Bench, Agra, deleting the penalty of Rs.34,30,000/- under Section 272-B of the Act pertaining to the assessment year 2003-04.

The appellants have framed the following questions as Substantial Questions of law in the memorandum of appeal :

(i) "Whether on the facts and in the circumstances of the case, the Tribunal is justified in law in deleting the penalty of Rs.34,30,000/-levied U/s 272-B of the Act by ignoring that there was no reasonable cause preventing the assessee to obtain and quote PAN of the deductees as provided u/s 139-A(5B) of the Act.

(ii) Whether on the facts and in the circumstances of the case, the Tribunal is justified in law in relying upon a decision of the Hon'ble Supreme Court in the case of Hindustan Steels Ltd. Vs. State of Orrissa reported in 1983 ITR 26(SC) despite the same having no applicability in the facts of the present case."

The appeal is admitted on the above noted two questions. With the consent of the parties, we now proceed to decide the appeal.

Briefly stated the facts giving rise to the present appeal are that the respondent-assessee is a public sector undertaking which is under the control of Ministry of Petroleum and Gas, Government of India. It has been deducting income tax at source as per the provisions of Section 194-C and 194-J of the Act on all the payments made to contractors/professionals during the financial year 2002-03. The tax so deducted was also deposited by it in the government treasury in time. The annual return of TDS as per the provisions of Section

203 of the Act, was also filed in the prescribed 'Form-26-C' and TDS certificates were issued to contractors/professionals. However, penalty at the rate of Rs.10,000/- for each 350 defaults committed by the respondent-assessee

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amounting to Rs. 35 lacs was imposed by the Additional Commissioner of Income Tax Range-I, Agra on the ground that the respondent-assessee has not mentioned Permanent Account Number in Form-16-A issued to 350 contractors. The Additional Commissioner, rejected all the submissions of the respondent-assessee, namely, that non mentioning of PAN in Form 16-A issued to certain contractors was neither intentional nor violative of the provisions, the contractor did not make it available at the time of issue of TDS certificates within the time prescribed, there is no legal obligation on the deductors to obtain PAN of the deductee either before or after deduction of tax at source and it is obligatory upon the deductee under section 139(5A) and if the payee has not informed their PAN to the deductor, the provisions of Section 139-A is not attracted and penalty under Section 272B cannot be imposed in view of the law laid down by Hon'ble Supreme Court in the case of 'Hindustan Steels Ltd. Vs.State of Orrissa reported in [1972] 83 ITR 26', the penalty will not ordinarily be imposed unless the parties obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation which circumstances do not exist in the present case and Section 272-B does not provide for penalty one default deducteewise under the Act. However, the Additional Commissioner rejected the explanations submitted by the respondent-assessee and imposed penalty.

In the appeal filed by the respondent-assessee, the CIT (Appeals), Agra upheld the levy of penalty on the ground that there was no reasonable cause for failure to obtain and quote PAN of the deductees. However, the matter was remanded to the A.O. to identify the defaults committed prior to the introduction of section 272B w.e.f. 1.6.2002 and reduce the penalty imposed in respect of such default.

Being aggrieved by this order the respondent-assessee filed an appeal before the Income Tax Appellate Tribunal, which was allowed by the impugned

order dated 23.4.2009. The appellants-department have filed the present appeal against the aforesaid order of the ITAT dated 23.4.2009.

We have heard Sri Shambhu Chopra, learned counsel appearing for the department and Shri Shubham Agrawal appearing for the respondent-assessee and perused the record.

We find that the Appellate Tribunal has discussed in detailing the facts and circumstances of the case and the relevant provisions of the Act and recorded the following findings in paragraph-3 of the impugned order.

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> "There is no dispute with regard to the fact that the appellant had deducted tax at source in all these cases and had also deposited the same, in time, in the government treasury. It also filed annual returns of TDS as per provisions of section 203 of the Act in Form No.26C, in time, and also issued requisite TDS certificates to the deductees. But it is a fact that in 350 cases, to whom payments were made and on account of which tax at source was deducted, but in Form No.16A, issued to these persons, their PAN was not mentioned. The arguments of the learned AR, to ward off the impugned penalty, are that the assessee honestly tried to follow the tax laws in this connection by deducting the tax at source and also deposited the tax in time with the government department. The appellant does not stand to gain by committing breach of the statutory provisions of the Act and is bound to deduct tax within time and to comply with other provisions of section 192 to 195 of the Act. It was further submitted that after deduction of tax, the appellant is liable to deposit the same under section 200 and to issue TDS certificates under section 203 and submit the return under section 206 of the Act, failing which, it would become liable for contravention of these sections. The further submission of the learned AR, to show reasonable cause for not mentioning PAN, is that many of these payees did not even possess PAN and that despite asking, they did not provide their PAN and as such, this is only a technical error by not mentioning the same in Form 16A. We are in agreement with the learned AR to this extent and not in agreement with the ld. DR because such a technical view of a particular provision of law cannot be taken particularly when the assessee has complied with all the requirements, as are envisaged in section 192 to 195 of the Act. By not mentioning PAN in Form 16A, the appellant is not going to be benefited in any manner and that it is very difficult in the given circumstances to obtain PAN of the payees. Under section 272B(1) of the Act, it is the discretion of the AO to levy a penalty in case any person fails to comply with the provisions of section 139A of the Act. The use of word "may" in this section clearly suggest that the levy of penalty is not mandatory and admits reasonable excuse for its exoneration. It is true that in some of the cases where TDS certificates were issued prior to 01.06.02, the ld. CIT(A) has accepted the

contention of the appellant and has reduced the penalty amount to Rs.34.30 lacs from Rs.35 lacs. There is no dispute that the appellant has violated the provisions of section 139A(5B) of the Act, but to our mind, the appellant has fully complied with all the other provisions of the Act, as stated above and there is no loss of Revenue to the department due to the conduct of the appellant as it has neither issued wrong certificates nor has mentioned any wrong particulars in TDS certificates. The conduct of the assessee in not providing PAN was not contumacious or fraudulent and the default in question was neither intentional nor willful. The default is purely a technical one. The appellant is a Public Limited Company and in these circumstances, the decision of Hon'ble Supreme Court rendered in the case of Hindustan Steels Ltd. vs. State of Orissa, 83 ITR 26(SC) comes to rescue because in that case, it has been held that 'when there is a venial or technical breach of the provisions of the Act or where the breach flows from a bonafide belief that the offender is not liable to act in the manner prescribed by the statute, the imposition of penalty would not be justified. 'Since the assessee is bound to deduct tax at source and to deposit the same in time and the payees may not in the circumstances, comply with the directions of the appellant, but if the assessee fails to deduct TDS, to deposit the same in the Government Treasury, to file the annual returns etc., various complex penalties are attracted. So given the peculiar circumstances, non mentioning of PAN in Form 16A, simpliciter, would not render the assessee exigible for this penalty. Consequently, by holding that only for pedantic reasons, i.e., non-mentioning of PAN without any purpose, would remove the assessee from the purview of penalty under section 272B of the

Act. Consequently, we order to delete the entire penalty and allow the appeal of the assessee."

We have given our thoughtful consideration to the submissions made by the learned counsel for the appellant and the respondents and perused the record including the impugned order of the Tribunal. To decide the issues raised in this appeal, it would be appropriate to refer the provisions of section 272-B,139-A(5-A), 139-A(5-B) and Section 273-B of the Act, which are reproduced below :

"272-B. (1) If a person fails to comply with the provisions of section 139A, the Assessing Officer may direct that such person shall pay, by way of penalty, a sum of ten thousand rupees.

2. If a person who is required to quote his permanent account number in any document referred to in clause © of sub-section(5) of section 139A, or to intimate such number as required by sub-section(5A) [or sub-section (5C)] of that section, quotes or intimates a number which is false, and which he either knows or believes to be false or does not believe to be true, the Assessing Officer may direct that such person shall pay, by way of penalty, a sum of ten thousand rupees.
3. No order under sub-section (1) or sub-section(2) shall be passed unless

the person, on whom the penalty is proposed to be imposed, is given an opportunity of being heard in the matter.

139-A (5A) Every person receiving any sum or income or amount from which tax has been deducted under the provisions of Chapter XVIIB, shall intimate his permanent account number to the person responsible for deducting such tax under that Chapter :

Provided further that a person referred to in this sub-section shall intimate the General Index Register Number till such time permanent account number is allotted to such person.

139-A (5B) Where any sum or income or amount has been paid after deducting tax under Chapter XVIIB, every person deducting tax under that Chapter shall quote the permanent account number of the person to whom such sum or income or amount has been paid by him--

i. in the statement furnished in accordance with the provisions of sub-section (2C) of section192 ;
ii. in all certificates furnished in accordance with the provisions of section 203;
iii. in all returns prepared and delivered or caused to be delivered in accordance with the provisions of section 206 to any income-tax authority.
iv. in all statements prepared and delivered or caused to be delivered in accordance with the provisions of sub- section (3) of section 200

Provided that the Central Government may, by notification in the Official Gazette, specify different dates from which the provisions of this sub-section shall apply in respect of any class or classes of persons :

Provided further that nothing contained in sub-sections (5A) and (5B) shall apply in case of a person whose total income is not chargeable to income-tax or

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who is not required to obtain permanent account number under any provision of this Act if such person furnishes to the person responsible for deducting tax, a declaration referred to in section 197A in the form and manner prescribed thereunder to the effect that the tax on his estimated total income of the previous year in which such income is to be included in computing his total income will be nil.

273-B. Notwithstanding anything contained in the provisions of [clause(b) of sub-section (1) of] [section 271, section271A, [section 271AA,] section 271B [section 271BA], [section271BB], section 271C,[section 271 CA,] section 271D, section 271E, [section 271F, [section 271FA] [section 271FB] section 271G,] [section 271H] clause © or clause(d) of sub-section (1) or sub-section (2) of section 272A, sub-section (1) of section 272AA] or [section 272B or] [sub-section (1) [or sub-section (1A)] of section 272BB or] [sub section (1) of section 272 BBB or] clause(b) of sub-section (1) or clause (b) or clause © of sub-section (2) of section 273, no penalty shall be

imposable on the person or the assessee, as the case may be, for any failure referred to in the said provisions if he proves that there was reasonable cause for the said failure.]"

A perusal of Section 139A(5A) shows that it puts an obligation on the person receiving any sum or income or amount from which tax has been deducted under the provisions of Chapter XVII(which include Section 194C and 194J) to intimate his permanent account number to the person responsible for deducting such tax under that Chapter. In the present case on facts presented before us it is clear that it was statutory obliteration of the contractors, who received certain amounts from the respondent assessee, from which tax was deducted under the provisions of Chapter XVII-B, to intimate their permanent account number to the respondent assessee. It is the specific stand of the respondent-assessee that certain contractors have not intimated their permanent account number and for that reason it could not be mentioned in Form-16A issued to such contractors. Section 139A(5B) makes it obligatory for every person deducting tax under Chapter XVII-B to quote the permanent account number of the person to whom such sum or income or amount has been paid by him. Thus, reading both the provisions together, namely, Section 139A(5A) and Section 139A (5B) it appears to us that the deductor may be at fault under section 139A (5B) if he does not quote the permanent account number of the persons to whom the amount has been paid, despite the intimation of permanent account number by such person to the deductor under section 139A(5A) of the Act. There is nothing on record to show that the contractors to whom certain amounts were paid by the respondent-assessee, had intimated their permanent account number to the respondent-assessee as required under section 139A(5A) of the Act. We are of the opinion that in the circumstances the respondent assessee successfully explained the **reasonable cause** to satisfy the provisions of Section 273B of the Act.

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Section 272-B has to be read along with Section 273-B of the Act. While Section 272-B(1) provides that if a person fails to comply with the provision of Section 139-B, the **Assessing Officer may** direct that such a person shall pay by way of penalty a sum of Rs.10,000/-, the provisions of Section 273-B provides that no penalty shall be imposable on the person or the assessee, as

the case may be, for any failure under section 272-B, if such person or the assessee proves that there was **reasonable cause for the said failure.**

The use of word "may" in Section 272-B read with the words "there was reasonable cause for the failure", used under section 273-B, makes it clear that the penalty under section 272-B is not mandatory. It can be imposed only when the authorities do not accept the explanation given by the assessee for reasons to be recorded in writing. The use of the word 'may' in section 272-B, makes the levy of penalty discretionary, subject to the reasonable cause to be furnished by the assessee.

We have also perused the provisions of Rule 114B to 114D of the Income Tax Rule 1962 and do not find anything which may run contrary to the interpretation given by us to section 272B, 139A (5A) and 139B(5B) of the Act.

The contention of the learned counsel for the appellant that the law laid down by the Hon'ble Supreme Court in the case of Hindustan Steels Ltd. Vs. State of Orissa reported in 1983 ITR 26(SC) is not applicable with regard to the levy of penalty under section 272B of the Act, is misconceived. We have already noted the provisions of Section 272B, 273-B and section 139A(5A) and 139A (5B) of the Act. A bare reading of the provision itself makes it clear that the penalty under section 272-B will not ordinarily be imposed unless the assessee has either acted deliberately in defiance of law or was guilty of conduct which is contumacious, dishonest or acted in conscious disregard to its obligation. The penalty under section 272B cannot be imposed merely because it is lawful to do so. It can be imposed for failure to perform statutory obligation. The imposition of penalty for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially, after considering the explanation of reasonable cause submitted by the assessee and on a consideration of all the relevant circumstances.

In the case of Hindustan Steels Ltd. (supra) the Hon'ble Supreme Court has observed as under :

" An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is

a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bonafide belief that the offender is not liable to act in the manner prescribed by the statute."

We find that the law laid down by the Hon'ble Supreme Court in the case of **Hindustan Steels Ltd. Vs. State of Orissa reported in 1983 ITR 26(SC)** is applicable looking to the provisions of Section 272-B read with Section 273B of the Act. Thus, the submission of the learned counsel for the appellant that the law laid down by the Hon'ble Supreme Court in the case of Hindustan Steels Ltd. (supra) is not applicable, is liable to be rejected.

We further find that on the findings recorded by the ITAT regarding no revenue loss and mere technical breach, clearly satisfies the test of reasonable cause under section 273B of the Act. In the present case the levy of penalty under Section 272-B of the Act by the assessing authority was fully unjustified.

We also find that the ITAT has elaborately dealt with the factual and legal aspect of the case and that the findings recorded by the ITAT on reasonable cause are findings of fact.

In view of the discussions made above, we of the view that the impugned order of the ITAT dated 23.4.2009 passed in Income Tax Appeal No. 40/Agr./2008 for the assessment year 2003-04 does not suffer from any error of law or facts. Accordingly, the order of the ITAT is upheld.

In the result, both the questions of law are answered in affirmative, i.e., in favour of the assessee and against the revenue. The appeal fails and is hereby dismissed. However, there shall be no order as to cost.

Order Date :- 19th August, 2013
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