

ALLAHABAD HIGH COURT

COMMISSIONER OF INCOME-TAX Versus PRABHU DAYAL AND BROTHERS

Compulsory Audit of Accounts – Failure – Section 44AB read with 271B - circular dated June 19, 1985 – ITAT hold that in view of the assessee filing the return of income within the time up to which extension had been sought and making the payment of tax under section 140A within that extended time, the assessee had satisfied the condition of the Central Board of Direct Taxes circular for payment of self-assessment tax within the normal period prescribed under section 139(1) of the Act for filing the return of income and thereby cancelled the penalty imposed under section 271B of the Income-tax Act – held that - As in the present case, in view of the circular of the Board the audit report has been obtained on September 30, 1985, that would be sufficient compliance with section 44AB of the Act. Thus, the Tribunal was justified in deleting the penalty. – decided in favor of assessee

Other Citation: [2009] 317 ITR 324 (All)

Appeal No. - 21 of 2000

Dated - July 16, 2009

R. K. AGRAWAL and S. K. GUPTA JJ.

A. N. Mahajan for the Commissioner.

None appeared for the assessee.

JUDGMENT

1. The Income-tax Appellate Tribunal, Allahabad, has referred the following question of law under section 256(1) of the Income-tax Act, 1961 (hereinafter referred to as "the Act"), for the opinion of this court:

"(1) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was justified in holding that in view of the assessee filing the return of income within the time up to which extension had been sought and making the payment of tax under section 140A within that extended time, the assessee had satisfied the condition of the Central Board of Direct Taxes circular for payment of self-assessment tax within the normal period prescribed under section 139(1) of the Act for filing the return of income and thereby cancelling the penalty imposed under section 271B of the Income-tax Act ?"

2. Briefly stated the facts giving rise to the present reference are as follows:

3. The reference relates to the assessment year 1985-86. In terms of the provisions of section 44AB of the Act, the assessee was required to get its account audited and to obtain an audit report by July 31, 1985. The same was, however, obtained only on September 27, 1985. For failure to comply with the provisions of section 44AB of the Act, a penalty of Rs. 1,00,000 was imposed vide order dated August 28, 1989 under section 271B of the Act. In appeal before the Commissioner of Income-tax (Appeals), the assessee referred to a circular of the Central Board of Direct Taxes (Circular No. 422, dated June 19, 1985), in terms of which considering the facts that the assessment year 1985-86 was the first year of the operation of section 44AB and that the relevant rule was notified only on January 31, 1985, penalty proceedings under section 271B were not required to be initiated for the assessment year 1985-86, in cases where -

"(i) the audit report prescribed under section 44AB read with rule 6G has been obtained by 30th September, 1985 ; and

(ii) the self-assessment tax under section 140A of the Act has been paid within the normal period prescribed under section 139(1) of the Act for filing return of income."

4. It was submitted that the return of income was due to be filed on or before July 31, 1985, but the assessee had filed several applications seeking extension of time to file the return up to March 31, 1986. The return was filed on March 7, 1986, and the self-assessment tax under section 140A was paid on February 4, 1986. On the facts the learned Commissioner of Income-tax (Appeals) held that the audit report prescribed under section 44AB having been obtained before September 30, 1985, the first condition of the Central Board of Direct Taxes circular was satisfied. Further, the learned Commissioner of Income-tax (Appeals) observed that under the proviso below section 139(1), the Assessing Officer had discretion to extend the date of furnishing the return, which in the present case could be deemed to have been extended till March 31, 1986, in view of extension applications filed by the assessee. Payment of tax under section 140A(1) have been made on February 4, 1986, before filing the return of income on March 7, 1986, it was held that the second condition of the Board's circular was also fulfilled. Accordingly, vide order dated March 19, 1990; the learned Commissioner of Income-tax (Appeals) cancelled the penalty imposed under section 271B of the Act.

5. The Department came in appeal before the Tribunal against the aforesaid order of the learned Commissioner of Income-tax (Appeals) and the Tribunal, after referring to the facts recorded in the order of the learned Commissioner of Income-tax (Appeals) found itself in agreement with the decision of the learned Commissioner of Income-tax (Appeals), in view of the facts that it had taken a similar view in some other appeal. Vide order dated October 31, 1996, rendered in I. T. A. No. 1523 (Alld.) of 1990, the Department's appeal was dismissed.

6. We have heard Sri A. N. Mahajan, learned standing counsel for the Revenue, nobody appeared on behalf of the respondent-assessee.

7. It is not in dispute that in terms of the circular dated June 19, 1985, issued by the Central Board of Direct Taxes which is binding upon all the authorities under section 119 of the Act, the respondent-assessee had obtained the audit report on September 27, 1985. The assessee had filed several applications from time to time seeking extension of time for filing the return up to March 31, 1986, and the return was filed on March 7, 1986, and the tax under section 140A of the Act was paid on February 4, 1986. This court in the case of ***CIT v. Jai Durga Construction Co. [2000] 245 ITR 857,(Given below)*** has held that penalty under section 271B of the Act was not imposable where the audit report has been obtained within the stipulated period. As in the present case, in view of the circular of the Board the audit report has been obtained on September 30, 1985, that would be sufficient compliance with section 44AB of the Act. Thus, the Tribunal was justified in deleting the penalty.

8. In view of the aforesaid discussion we answer the question referred to us in the affirmative, i.e., in favour of the assessee and against the Department. The reference is accordingly answered. There shall be no order as to cost

**Commissioner Of Income-Tax Versus Jai Durga Constructions Co.
ALLAHABAD High Court**

Other Citation: [2000] 245 ITR 857, 164 CTR 512, 133 TAXMANN 99

Commissioner Of Income-Tax Versus Jai Durga Constructions Co.

**Head Note
Penalty, Law Applicable**

Dated - November 18, 1999
Judge(s): M. C. AGARWAL., S. RAFAT ALAM

JUDGMENT

This appeal under section 260A of the Income-tax Act, 1961 (hereinafter referred to as "the Act"), has been preferred by the Commissioner of Income-tax, Allahabad, against an order dated November 5, 1998, passed in ITA No. 2343 (Alld.) of 1993 for the assessment year 1991-92. The following substantial questions of law are stated to arise out of the said order :

"(i) Whether the Tribunal was justified in dismissing the Departmental appeal and holding that audit report was obtained before the specified date in view of the fact that it was prepared on the last date of the specified date, i.e., on October 31, 1991, and without confirming/verifying when it was obtained by the assessee in view of the fact that it was filed along with the return of income on January 20, 1992 ?

(ii) Whether the Tribunal was justified in holding that audit report was obtained before the specified date as provided under section 44AB of the Income-tax Act, 1961, in view of the fact that audit report (as is evident from the date given on it) itself was prepared on October 31, 1991 ?

(iii) Whether the Tribunal was justified in holding that there was no requirement of law, as it stood at the relevant point of time, before its amendment from July 1, 1995, of filing the audit report before the specified date in view of the fact that section 44AB of the Income-tax Act, 1961, says that audit report be 'obtained before' the specified date so that it may be filed along with the return of income by/on the specified date ?"

We have heard Sri Prakash Krishna, learned counsel for the appellant.

The relevant part of the Tribunal's order is as under :

"2. In terms of section 44AB of the Income-tax Act, 1961, the assessee was required to get its accounts audited and to obtain the audit report by October 31, 1991. The audit report dated October 31, 1991, was filed by the assessee along with the belated return furnished on January 20, 1992. The Assessing Officer held that on account of its failure to furnish the return of income along with the audit report within the time allowed under section 139(1) of the Income-tax Act, the assessee was liable to penalty under section 271B of the Act. The penalty under consideration was imposed. In appeal, the learned Commissioner of Income-tax (Appeals), following certain decisions of the Income-tax Appellate Tribunal Benches, held that the audit report having been obtained in time, no penalty was exigible under section 271B of the Income-tax Act.

3. Both the parties were heard. There is no dispute about the fact that the audit report was obtained before the specified date. Most of the Benches of the Tribunal, including the Allahabad Benches, have been taking a view that in a case where the audit report has been obtained by an assessee before the specified date, the mere fact that it has been filed belatedly along with the belated return of income, would not attract imposition of penalty under section 271B of the Act. It has been so held because the provisions of section 44AB, as they stood at the relevant point of time, did not require filing of audit report independently. It was only after realising the lacuna of law that the provisions of section 44AB and section 271B were amended by the Finance Act, 1995, with effect from July 1, 1995, enjoining upon the assessee to furnish the audit report before the specified date. These amendments have not been made retrospective in operation, which fact also confirms that at the relevant point of time, filing of the audit report before the specified date, was not the requirement of law. In the view of the matter also, the order of the learned Commissioner of Income-tax (Appeals) cancelling the penalty does not call for any interference."

At the relevant time, the obligation created by section 44AB was merely to get the accounts audited before the specified date. There was no obligation to furnish that audit report before the Assessing Officer before the specified date. This obligation has been created by substituting the words "furnish by" for the words "obtain before" by the

Finance Act, 1995, with effect from July 1, 1995. Thus, prior to the amendment the obligation of an assessee to whom under section 44AB applied was merely to get the accounts audited and obtain an audit report before the specified date. There is no dispute that in the present case the assessee complied with these requirements. The contention of the Commissioner that if the report has not been filed before the Assessing Officer before the specified date, the assessee becomes liable to penalty under section 271B is not sustainable from the language of section 44AB or section 271B. We are, therefore, of the opinion that the legal position is clear and self-evident and the Tribunal has taken the correct legal view. Therefore, no substantial question of law arises in the appeal. The same is hereby dismissed in limine.