* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : November 2, 2006.

% Date of Decision : November 7, 2006

\+ ITA No. 326 of 2003

1. SHYAM GOPAL CHARITABLE TRUST ..... Appellant.
Through Mr. C.S. Aggarwal, Senior Advocate with
Mr. Salil Aggarwal and Mr. Prakash Kumar,
Advocates

versus

DIRECTOR OF INCOME TAX(EXEMPTION) ... Respondent.
Through Mr. R.D. Jolly, Advocate.

with

ITA No. 327 of 2003

2. SHYAM GOPAL CHARITABLE TRUST .....Appellant.
Through Mr. C.S. Aggarwal, Senior Advocate with
Mr. Salil Aggarwal and Mr. Prakash Kumar,
Advocates

versus

DIRECTOR OF INCOME TAX(EXEMPTION) ... Respondent.
Through Mr. R.D. Jolly, Advocate.

AND

ITA No.328 of 2003

3. SHYAM GOPAL CHARITABLE TRUST ..... Appellant.
Through Mr. C.S. Aggarwal, Senior Advocate with Mr. Salil Aggarwal and Mr. Prakash Kumar, Advocates

versus

DIRECTOR OF INCOME TAX(EXEMPTION) ... Respondent.
Through Mr. R.D. Jolly, Advocate.

AND

ITA No.329 OF 2003

4. SHYAM GOPAL CHARITABLE TRUST ..... Appellant.
Through Mr. C.S. Aggarwal, Senior Advocate with Mr. Salil Aggarwal and Mr. Prakash Kumar, Advocates

versus

DIRECTOR OF INCOME TAX(EXEMPTION) ... Respondent.
Through Mr. R.D. Jolly, Advocate.

CORAM :-
HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE DR. JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be allowed to see the judgment? ✓
2. To be referred to the Reporter or not? ✓
3. Whether the judgment should be reported in Digest?

: Dr. S. Muralidhar, J.

1. These four appeals under Section 260 A(1) of the Income Tax Act, 1961 (Act) are directed against the common order dated 25.11.2002 passed by the Income Tax Appellate Tribunal (Tribunal), Delhi Bench 'A' in ITA No 3631-3634/Del/98.

2. These proceedings concern the penalty levied on the appellant under Section 272 A(2)(e) of the Act for the delay in filing income tax returns for the assessment years (AYs) 1990-91, 1991-92, 1995-96, 1996-97 and 1997-98. The period of delay and the corresponding penalty imposed are set out in the table below :

ASSTT YEAR	RETURN FILED ON	PERIOD OF DELAY IN DAYS	PENALTY IMPOSED (RS.)
1990-91	17.9.1998	2875	2,87,500
1991-92	17.9.1998	2510	2,51,000
1995-96	17.9.1998	1050	1,05,000
1996-97	17.9.1998	655	65,500
1997-98	15.9.1998	318	31,800

3. The Appellant is a charitable trust which came to be established by a Trust Deed dated 3.10.1983. The appellant was granted

registration under Section 12- A of the Act by the Commissioner of Income Tax, Delhi – 110 006 vide order dated 31.10.1983/1.11.1983. The Appellant trust was created with an object of running a school to provide education to poor children living in slums and who cannot avail the opportunity of going to municipal or public schools.

4. The Appellant claimed that for the relevant AYs its income was not taxable in view of the exemption under Section 10 (22) read with Section 11 of the Act. According to the Appellant, as per its audited account, its income for the relevant AYs were as under :

ASSTT YEAR	INCOME	FUNDS AS ON 31st MARCH
1990-91	14,521	35,656
1991-92	1,097	35,753
1995-96	(-) 7,266	69,305
1996-97	13,364	82,689
1997-98	15,593	98,282

5. The Appellant claimed that initially its Chartered Accountant advised that since the income of the Appellant was below the taxable limit, it was not required to file any return of income for the above AYs. Later, the Chartered Accountant reconsidered his opinion and

advised that with a view to avoiding any complication arising under Section 139 (4A) of the Act, the Appellant should file its returns. Accordingly, on 15.9.1998 and 17.9.1998 the Appellant filed returns for the aforementioned AYs declaring Nil income. It is not in dispute that these returns were accepted by the Department. However, since the returns were filed belatedly, the Assessing Officer (AO) referred the case to the Joint Director of Income Tax (Exemption) for initiating penalty proceeding under Section 272A (2)(e) of the Act.

6. It is the case of the Department that a notice under Section 272 A (2)(e) was issued to the appellant on three dates, i.e., 10.9.1999, 4.2.2000 and 2.3.2000 for each AY for which the return was filed late and that the Appellant assessee did not respond to any of these notices. Consequently, on 22.7.2003 the Joint Director passed an order levying separate penalties for each of the AYs in the amounts indicated hereinabove.

7. The Appellant filed appeals before the Commissioner of Income Tax (CIT) (Appeals) assailing the levy of penalty. It was

urged before the CIT (Appeals) that "after filing the return of income, no notice whatsoever was received by the assessee." It was further stated that "as alleged in the order under Appeal, no notice under Section 272 A(2)(e) of the Act for the above assessment years was served on the assessee or its representative." Apart from contending that the Appellant was not afforded an opportunity by the AO of adducing evidence relevant to the question of penalty, the Appellant also filed an application before the CIT (A) under Rule 46 A of the Income Tax Rules seeking place on record a copy of the income and expenditure account and supporting details as evidence in support of its claim for withdrawing the penalty.

8. By its order dated 5.7.2001, the CIT (Appeals) dismissed the appeal. After referring to the notice issued to the Appellant on the three dates as mentioned hereinabove, the CIT (Appeals) observed that "the learned AR has brought no evidence on record to show that the aforecited notices were not received." The CIT (Appeals) proceeded to conclude that :

"Since the appellant has brought forth no

> evidence or convincing reasons to show that the appellant was prevented by sufficient reasons from complying with the notices issued by the JDIT (E), I see no infirmity in the decision taken by the JDIT (E) in levying the aforesaid penalties which are hereby confirmed. The five appeals in question are thus dismissed."

9. The CIT (Appeals) nevertheless also dealt with the case on merits and held as follows :

> "In view of the admitted claim of exemption under Sections 11 and 12 by the appellant [and not under Section 10(22)] in the returns of income filed, the appellant's case is squarely covered by the provisions of Section 139 (4A) read with Section 139 (1), infringement whereof is clearly covered by the penalty proceedings under Section 272A (2)(e). It is also seen that the instant appeal has been argued by top notch C As/lawyers and as such, it is also not clear that if the appellant was in doubt regarding the filing of the returns why it could not consult the battery of legal luminaries whom it has consulted during the appellate proceedings."

10. The Tribunal noticed the Appellant's contention that it received no notice under Section 272 A (2)(e) of the Act. It further took note of the net income of the Appellant for the relevant assessment years

and held that :

> "As the net income of the assessee in all the years was in excess of the minimum exemption limit for taxation, we hold that it was obligatory on the part of the assessee to file the return of income on or before due dates."

The Tribunal negatived the appellant's plea that there was reasonable cause shown by it for not filing the returns in time. The penalties imposed by the JDIT were affirmed by the Tribunal.

11. Mr. C.S. Aggarwal, the learned senior counsel appearing for the Appellant submits that the authorities below failed to return a finding on the contention of the appellant that it was not served with notices under Section 272 A (2)(e) of the Act. He argued that the mere issuance of a notice did not amount to service of such notice. He placed reliance upon the judgment of the Full Bench of this Court in ***J.T. (India) Exports v. Union of India*** 262 ITR 269 (Del) to contend that service of such notice prior to the penalty proceedings, was imperative even if the statute did not provide for it. While not denying that the filing of returns under Section 139 (4A) of the Act was mandatory, Mr. Aggarwal submits that the explanation offered

by the Appellant for filing them belatedly constituted a reasonable ground for waiver of the penalty in terms of Section 273 B of the Act. He also relied upon the judgment of the Supreme Court in ***Concord of India Insurance Co. Ltd v. Smt. Nirmala Devi*** 118 ITR 507 to contend that the mistaken advice given by the Chartered Accountant could not be brushed aside as unbelievable in order to visit the Appellant with adverse consequences.

12. On the other hand, Mr. R.D. Jolly, the learned counsel for the Revenue submits that Section 139 (4A) of the Act requires strict compliance and the failure to comply with the said provision had to perforce attract the penalty under Section 272 A (2)(e) of the Act. Although the issuance of a notice prior to imposition of the penalty was not mandatory under that provision, the Department had nevertheless issued three notices to the Appellant despite which no response was forthcoming. Therefore, the Appellant had been given sufficient opportunities. The imposition of penalty was, in the circumstances, totally justified. Contending that there was no question of equity in taxing statutes, Mr. Jolly, submitted that the

requirement of Section 273 B of the Act cannot be said to have been met in the present case and the penalty could not be waived.

13. The undisputed fact is that the Appellant is a charitable trust. The income tax returns for the relevant AYs were filed late. They were, however, Nil returns and accepted as such by the Department. The only issue, therefore, is whether there was a justification for imposition of penalty on the appellant for its failure to file the returns within the time stipulated.

14. The provisions of the Act relevant for the present purposes are under :

> "**Section 139 4A** Return of Income : Every person in receipt of income derived from property held under trust or other legal obligation wholly for charitable or religious purposes or in part only for such purposes, or of income being voluntary contributions referred to in sub-clause (iia) of clause (24) of section 2, shall, if the total income in respect of which he is assessable as a representative assessee (the total income for this purpose being computed under this Act without giving effect to the provisions of Sections 11 and 12) exceeds

the maximum amount which is not chargeable to income tax, furnish a return of such income of the previous year in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and all the provisions of this Act shall, so far as may be, apply as if it were a return required to be furnished under sub-section(1).

Section 272 A (2)(e) If any person fails to to furnish the return of income which he is required to furnish under sub-section (4A) or sub-section (4C) of Section 139 or to furnish it within the time allowed and in the manner required under those sub-sections he shall pay, by way of penalty, a sum of one hundred rupees for every day during which the failure continues.

Section 273 B *Penalty not to be imposed in certain cases* : Notwithstanding anything contained in the provisions of clause (b) of sub-section (1) or clause (b) or clause (c) 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."

15. It is the case of the Department that three prior notices dated 9.9.1999, 9.2.2000 and 2.3.2000 were issued to the Appellant. However, the case of the Appellant is that it has not received any of

these notices. The Appellant has maintained this both before the CIT (Appeals) and the ITAT. Unfortunately, the CIT (Appeals) did not deal with this issue and shifted the burden on to the Appellant to show that the aforesaid notices were not received by it. The ITAT, too, despite noticing this contention does not deal with at all. In our view, in the facts of the present case, where the Department contends that notices were issued, and the Assessee denies receiving such notices, the burden is on the department to show that such notices were served on the assessee. There is no finding rendered by the CIT (Appeals) or the ITAT that the notices in question were in fact served on the assessee. Therefore, the only conclusion that can be drawn is that the assessee was not served these notices and was consequently not afforded the opportunity of being heard before the penalties were imposed. In our view, this by itself is sufficient to set aside the orders imposing the penalty on the appellant for the AYs in question.

16. Respectfully adopting the reasoning of the Full Bench of this Court in *J.T. (India) Exports* (supra) which was rendered in the context of the Imports and Exports (Control) Act, 1947 we are of the

view that there is an implied requirement of the principles of natural justice that before imposing a penalty under Section 272 A (2)(e) of the Act, notices are required to be both issued and served upon the Assessee to enable it to defend itself in the penalty proceedings. It is trite that the imposition of any penalty has adverse civil consequences and has to be preceded by the affording of an opportunity of being heard to the assessee. Only then can the assessee urge factors relevant to the question of penalty and independent of the explanations offered during assessment proceedings. It affords a chance to the assessee to show why penalty should be either waived altogether or should be less than what is proposed by the Department.

17. On the merits of the case, we find that the explanation offered by the Appellant for not filing the returns within the time stipulated under the Act appears to be a plausible one. In this context, we may recall the observations of the Kerala High Court in ***State of Kerala v. Krishna Kurup Madhava Kurup*** AIR 1971 Ker 211 which was approved and extracted by the Hon'ble Supreme Court in ***Concord of***

India Insurance Co. Ltd. (supra) (p. 511) :

> "I am of the view that legal advice given by the members of the legal profession may sometimes be wrong even as pronouncement on questions of law by courts are sometimes wrong. An amount of latitude is expected in such cases for, to err is human and laymen, as litigants are, may legitimately lean on expert counsel in legal as in other departments, without probing the professional competence of the advice. The court must, of course, see whether, in such cases there is any taint of male fides or element of recklessness or ruse. If neither is present, legal advice honestly sought and actually given, must be treated as sufficient cause when an application under Section 5 of the Limitation Act is being considered."

18. We are of the view that the appellant ought not to be made to suffer penalty, in the peculiar facts of the present case, for having acted upon an advice of its Chartered Accountant and not filing the income tax returns in time. We should not be understood as laying down a general proposition that in all cases where the assessee fails to file returns in time and attributes the failure to an advice by its Chartered Accountant, that by itself constitutes a sufficient explanation in terms of Section 273 B of the Act. Each case would

have to be tested on its merits by the authorities concerned or the Court, as the case may be, for coming to a conclusion that sufficient grounds in the context of Section 273 B have been made out for not imposing a penalty for the failure to file returns within the time stipulated.

19. On the facts of the present case, we are of the considered view that the Appellant has proved that there was reasonable cause within the meaning of Section 273 B of the Act for the failure to file income tax returns for the relevant AYs within the time stipulated and, therefore, no penalty was required to be levied in terms of Section 272 A (2)(e) of the Act.

20. For these reasons, the impugned orders of the authorities below, i.e., the AO, CIT (Appeals) or the ITAT are hereby set aside. The appeals are, accordingly, allowed with no orders as to costs.

S. MURALIDHAR, J

VIKRAMAJIT SEN, J

NOVEMBER 7, 2006
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