

HIGH COURT OF CALCUTTA

Sagar Dutta

v.

Commissioner of Income-tax, Kolkata

GIRISH CHANDRA GUPTA AND SUDIP AHLUWALIA, JJ.

GA NO. 3223 OF 2013

ITAT NO. 176 OF 2013

IT APPEAL NO. 150 OF 2009

FEBRUARY 17, 2014

R.K. Biswas, P.K. Bhowmik and Ranjan Sinha *for the Appellant.*

ORDER

The Court : Both these two appeals were taken up together because the common questions of law have arisen in these two appeals.

2. The appellant, Amal Ganguly, was served with a notice to show cause why penalty under Section 271B shall not be imposed upon him. To be precise the relevant portion of the show cause notice reads as follows :—

"Assessee filed I.T. Return on 04.03.2004 declaring a total income of 2,95,51,989. Assessment u/s. 143(3) and assessed income is Rs. 2,95,56,860/-

Scrutiny of records revealed that the total income of the assessee had included on income from profession to the tune of Rs. 1,17,43,893/-. This income comprised of the followings :

1. Salary, allowance and interest on capital from Price Waterhouse	Rs. 1,02,90,716/-
2. Commission from Price Waterhouse	Rs. 14,49,700/-
3. Interest from Price Waterhouse	Rs. 1,721/-
4. Interest from chockey, Bhargav & Co.	Rs. 1,756/-
	Rs. 1,17,43,893/-

Assessee has not got his account audited U/s. 44AB in prescribed format and not submitted that in violation section 44AB of I.T. Act. You are asked to show cause. So why penalty U/s. 271B of Rs. 58,719 (().50% of Rs. 1,17,43,893/-) should not be levied."

3. An identical notice was issued to the appellant, Sagar Dutta, which reads as follows :—

"On a perusal of your return of income it appears that you derived income under the head Profit and gains of business or profession and the sums exceeded ten lakh rupees. As a person carrying on a profession where gross receipts exceeded ten lakh rupees your accounts was required to be audited in terms of provision of sec 44AB of the Income Tax Act '61. Failure to have got your accounts audited and furnished the same before the due

date of filing of return in the prescribed manner attracts penalty u/s 271B of the Income Tax Act '61."

4. From the assessment order it appears that the total income earned by the assessee Sagar Dutta was Rs. 97,93,590/- out of which a sum of Rs. 74,16,000/- was on account of income from business or profession.

5. After hearing the appellant, penalty was imposed under Section 271B. Aggrieved by the said order the appellant preferred an appeal to the CIT (Appeals) unsuccessfully. The appellant also unsuccessfully challenged the order before the learned Tribunal and has finally come up before this Court.

6. Mr. Biswas, learned Advocate appearing for the appellant submitted that in imposing the penalty there has been gross violation of sub-section 2 of Section 274 which provides as follows :—

"274(2) No order imposing a penalty under this Chapter shall be made –

(a) by the Income Tax Officer, where the penalty exceeds ten thousand rupees;

(b) by the Assistant Commissioner (or Deputy Commissioner) where the penalty exceeds twenty thousand rupees ;

except with the prior approval of the (Joint Commissioner)"

7. He submitted that the order imposing penalty does not disclose that prior approval of the Joint Commissioner was obtained in either of the two cases. He drew our attention to a judgment of this Court in the case of AWT No. 4 of 2003 and AWT No. 5 of 2003, dated 30-9-2013 (*Indrajit Banerjee v. CWT*) to which one of us (Girish Chandra Gupta, J.) was a party wherein the following view was taken considering various judgments cited at the Bar :—

"The Income Tax Officer had no jurisdiction to impose penalty exceeding a sum of Rs. 10,000/- except with the approval of the Deputy Commissioner. Mr. Agarwal submitted that it is a question of fact. We are unable to accept this submission. It was the obligation of the Income Tax Officer to indicate in his order that he passed the order after obtaining requisite approval. Since the order passed by the Income Tax Officer does not contain the requisite recital, it has to be held that no such approval was obtained. The order itself is incompetent. An incompetent order is a nullity and the point as regards nullity can be taken at any stage. It can even be taken at the stage of execution. Even if the orders imposing penalty were not set aside by us, which we propose to do, the order could not have been executed. Therefore, the third question is answered in the affirmative."

8. Mr. Biswas, therefore, contended that the order imposing penalty is altogether bad and cannot be sustained. Mr. Bhowmik, learned Advocate submitted, in fairness the appellant should have raised this point at an earlier stage, which they did not do. He added that the matter in that case has to be remanded to the Assessing Officer for passing an order under Section 271B de novo after obtaining prior approval of the Joint Commissioner.

9. After hearing the learned Advocates appearing for the parties we are of the opinion that the impugned orders cannot be sustained. Therefore, both the orders imposing penalty are set aside in both the two appeals.

10. The matters are remanded to the Assessing Officer for passing an order under Section 271B after obtaining necessary approval and hearing the parties in accordance with law.

Both the appeals are thus disposed of.