IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 77 of 1996

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA
HONOURABLE MR.JUSTICE Z.K.SAIYED

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME TAX - Applicant(s)
Versus
KASHIRAM TEXTILE MILLS PVT.LTD - Respondent(s)

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Appearance :
MR MANISH R BHATT for Applicant(s) : 1,
SERVED BY RPAD - (N) for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

and

HONOURABLE MR.JUSTICE Z.K.SAIYED

Date : 29/01/2008

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1. The following question has been referred by Income-Tax Appellate Tribunal, Ahmedabad Bench “B” at the instance of Revenue u/s. 256(2) of the Income-Tax Act, 1961 (“the Act”) :

> “Whether, the Appellate Tribunal is right in law and on facts in cancelling the penalty levied u/s.271 B of the Act amounting to Rs.1 lac on the ground that a liberal approach is to be adopted in the first year of the requirement of tax audit.”

2. The Assessment Year is 1985-86 and the relevant accounting period is year ended on 30.9.1984. Original Return of income was filed on 27.9.1985. Subsequently revised Return was filed on 30.4.1986, accompanied by Tax Audit Report dated 31.3.1986. As the Tax Audit Report was filed belatedly the Assessing Officer levied penalty amounting to Rs.1 lac under Section 271-B of the Act holding that the assessee was not prevented by any reasonable cause and there was a default u/s. 44AB of the Act. The assessee carried the matter in Appeal, but the penalty was confirmed by the Commissioner (Appeals).

3. In Second Appeal before the Tribunal the assessee succeeded. Vide order dated 5.8.1993 the Tribunal deleted the penalty by recording as under :

> “It is amply clear from the observations made by the jurisdictional High Court that so far as A.Y. 1985-86, which is the first

year of application of the provisions relating to tax audit, namely, Section 44AB and 271B, a liberal approach should be made. It has been ob served by the Court that in order to mitigate the inconvenience and hardships to assessee, particularly in relation to A.Y. 1985-86, the Board of Director Taxes may consider the advisability of issuing directions on the lines contained in Circular No.205 dated 27th July, 1976. Moreover the plain language of Sec. 271B indicates that mere delay or default was not enough but it was necessary on the part of the A.O. to prove that such default had occurred without any reasonable cause. The words “without reasonable cause” has been omitted by the above referred amending Act w.e.f. 10.9.1986. The circular issued by the Board explaining the object of the said amendment clearly reveals that such an amendment was made with a view to shift the burden which lay on the department to the assessee. With this object, the provisions of Section 273 B was inserted by the same amending Act w.e.f. 10.9.1986 providing that notwithstanding anything contained in Section 271B and other sections enumerated in section 273B, no penalty shall be imposable for the failure referred to in Section 271B if the assessee proves that there was reasonable cause for the said failure. The aforesaid amendment made w.e.f. 10.9.86 clearly supports the assessee's contention that prior to this date, the burden lay on the department to prove that such a default had occurred without reasonable cause. The department has not discharged such a burden. Even assuming that the assessee had to prove the existence of a reasonable cause, the material already existing on record clearly show that the accounts for the previous year were audited on 2nd February, 1985 as required by the Companies Act. The accounts for the year ended on 30th September, 1984 could be finalized only thereafter and then the audit as required under the provisions of the Companies Act could be taken up. The audit under the provisions of the Companies Act for the year under consideration was completed on 26.11.1985. The tax audit and the various requirements of the tax audit were then sorted out from the books of account and ultimately the tax audit was completed on 31st March, 1986. The validity of the provisions was also under challenge before the jurisdictional High Court and the constitutional validity of those provisions was upheld vide the above referred judgment dated 31st March, 1986. With the observation for adopting a liberal approach for the first year viz. for A.Y. 1985-86. Considering all these facts and circumstances and considering the fact that this was the first year of the requirement of tax audit, we are of the considered opinion that the delay in obtaining the tax audit report was fully explainable by the aforesaid reasonable cause explained by the assessee before the department authorities. The penalty was, therefore, not validly imposable for the aforesaid year. We, therefore, cancel the said penalty."

4. Heard Mr. M.R.Bhatt, learned Senior Standing Counsel for the applicant – Revenue. Though served, there is no appearance on behalf of the respondent – assessee.

5. Apart from reiterating what has been recorded by the Assessing Officer in the penalty order Mr. Bhatt submitted that if the Return of Income had been filed on 27.9.1985 there is no reason why the Tax Audit Report could not have been tendered along with said Return of Income. It was, therefore, submitted that the Tribunal had

committed an error in accepting the explanation tendered by the assessee.

6. As can be seen from the findings recorded by the Tribunal, reproduced hereinbefore, it is an accepted fact that the accounts of the assessee company were audited for the immediately preceding year under the provisions of the Companies Act only on 2.2.1985. The Tribunal has, therefore, rightly come to the conclusion that the accounts for the year under consideration, namely, year ending on 30.9.1984, could be finalized only after 2.2.1985. In fact there is no dispute that the accounts, under the Companies Act, were finalized for the year under consideration only on 26.11.1985. Once this is the position the Tax Audit was undertaken and completed on 31.3.1986. It is in context of the aforesaid facts that the Tribunal has, after referring to the Judgment of this Court, adopted liberal approach for determining whether reasonable cause existed or not. In fact the Tribunal has found that the Department has failed to discharge the burden; and, if the burden was on the assessee the same was discharged by the assessee.

7. There is nothing to indicate any legal infirmity in the impugned order of Tribunal. The findings recorded by the Tribunal are findings of fact based on appreciation of evidence and such

findings remain undisputed. The Tribunal was, therefore, justified in deleting the penalty levied under Section 271-B of the Act. Liberal approach was required to be adopted as directed by this Court for the simple reason that Assessment Year 1985-86, namely, the year under consideration was the first year during which provision of Section 44AB of the Act had been made applicable after being brought on the statute Book.

8. In the circumstances, the question referred for the opinion of this Court is answered in affirmative i.e. in favour of the assessee and against the Revenue. Reference stands disposed of accordingly with no order as to costs.

(D.A.MEHTA, J.)

(Z.K.SAIYED,J.)

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