

**(2010) 05 CAL CK 0050**

**Calcutta High Court**

**Case No:** Writ Petition No. 16817 (W) of 1997

M/s. Mysore Agro Chemical  
Company Pvt. Ltd. and Another

APPELLANT

Vs

The Commissioner of Income  
Tax, West Bengal-III, Calcutta  
and Others

RESPONDENT

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**Date of Decision:** May 18, 2010

**Acts Referred:**

- Income Tax Act, 1961 - Section 139, 142, 143(1)(a), 154, 263

**Citation:** (2010) 4 CALLT 89

**Hon'ble Judges:** Debasish Kar Gupta, J

**Bench:** Single Bench

**Advocate:** Sutapa Roy Chowdhary, for the Appellant; K.M. Nizamuddin and Mr. P. Dhondonia, for the Respondent

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### **Judgement**

Debasish Kar Gupta, J.

This writ application is directed against the orders dated June 19, 1996, August 21, 1996 passed by the Respondent No. 2 u/s 271B of the Income Tax Act, 1961 as also the order dated May 26, 1997 passed u/s 264 of the Income Tax Act, 1961 by the Respondent No. 1 for the assessment years 1993-94 and 1994-95.

2. The facts of the case in a nutshell are as under:

The Petitioner No. 1 was a private limited company and the Petitioner No. 2 was the Managing Director of the Petitioner No. 1. The profit and loss account, balance sheet as on March 31, 1993 and the audit report of the Petitioner No. 1 were signed by the auditor on August 30, 1993. The due date for filing return for the assessment year 1993-94 was December 31, 1993. A return for the assessment year 1993-94 was filed on December 14, 1994 on behalf of the Petitioner company together with tax audit report in form No. 3CD of the Income Tax Act, 1961 (hereinafter referred to as the

said act) enclosing the aforesaid audited profit and loss account and balance sheet as on March (sic)1993 duly signed by the auditor on August 30, 1993. A communication dated December 8, 1995 was received by the Petitioner company from the Respondent authority determining the refundable amount of Rs. 783/- u/s 143(1)(a) of the said Act. The Respondent No. 2 passed a further order dated March 18, 1996 under the provisions of Section 143(l)(a) read with Section 154 of the said Act for the purpose of rectification of mistake revising the total income and tax payable by the Petitioner company. As a result, whereof a sum of Rs. 14,664/- was assessed as payable by the Petitioner company.

3. Similarly, profit and loss account, balance sheet as on March 31, 1994 and a audit report of the Petitioner company were duly signed by, the auditor on August 30, 1994. Due date for filing return for the assessment year 1994-95 was November 30, 1994. A return was filed by the Petitioner company for the assessment year 1994-95 on August 29, 1995 together with tax audit report in form No. 3CD of the said act enclosing the aforesaid audited profit and loss account and balance sheet duly signed by the auditor on August 30, 1994.

4. Two notices dated December 8, 1995 and February 14, 1996 respectively were issued by the Respondent No. 2 asking the Petitioner company to show-cause as to why orders imposing penalty upon the Petitioner company should not be passed under the provisions of Section 271B of the said Act for failure on behalf of the Petitioner company to get his accounts for the assessment years 1993-94 and 1994-95 audited as also to obtain and furnish audit report as required u/s 44AB of the said Act. The Petitioner submitted his replies dated January 12, 1996, January 14, 1996 and March 18, 1996 respectively in response to the aforesaid show-cause notices. The Respondent No. 2 passed an order dated June 19, 1996 holding the Petitioner Company guilty in accordance with the provisions of Section 271B of the said Act as also imposing penalty of a sum of Rs. 52,482/- in relation to assessment year 1993-94. The Respondent No. 2 passed a similar order dated August 21, 1996 against the Petitioner company in relation to assessment year 1994-95 holding the Petitioner Company guilty under the provisions of Section 271B of the said Act as also imposing a penalty of Rs. 75,931/-.

5. The Petitioner company filed two applications u/s 264 of the said Act before the Respondent No. 1 challenging the aforesaid two orders dated June 19, 1996 and August 21, 1996 respectively. The Respondent No. 1 passed consolidated order dated May 26, 1997 in connection with the aforesaid two applications conforming the orders dated June 19, 1996 and August 21, 1996 respectively passed by the Respondent No. 2. Hence this writ application.

6. It is submitted by the learned advocate appearing for the Petitioners that an amendment of Section 44AB of the said Act came into operation with effect from July 1, 1995. According to her, the unamended provisions of Section 44AB was in operation at the time of filing returns under reference and under that unamended

provisions of Section 44AB the Petitioner company was under obligation to get the accounts of previous years audited by an accountant before the specified dates and obtain before that date the report of such audit in the prescribed form duly signed and verified by such accountant setting forth such particulars as may be prescribed. According to her, consequent upon the amendment of the above provisions which came into force with effect from July 1, 1995 the Petitioner company was under obligation not only to get the accounts of previous year audited by an accountant before the specified date but also to furnish by that date the report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed. It is further submitted on behalf of the Petitioner company that the Respondent No. 2 was in error of law in applying the aforesaid amended provisions of Section 44AB of the said Act for imposing penalty upon the Petitioner company in respect of the assessment years 1993-94 and 1994-95 by virtue of the impugned orders. And for the same reason the consolidated order of the Respondent No. 1 was also bad in law.

7. Drawing the attention of this Court towards the provisions of Sub-section (4) of Section 139 of the said Act it is further submitted by the learned advocate appearing for the Petitioner that it was permissible for the Petitioner company to furnish the returns under reference at any time before the expiry of one year from the end of the respective relevant assessment years. It is further submitted by the learned advocate appearing for the Petitioner that no penalty could be imposed upon the Petitioner company in respect of assessment years 1993-94 and 1994-95 in accordance with the above provisions. In view of the admitted facts that the returns in respect of the aforesaid periods were filed on December 14, 1994 and November 30, 1994, i.e. before the expiry of one years from the end of the relevant assessment years on 1994 and March 1995 respectively.

8. Reliance is placed upon the decisions of [Commissioner of Income Tax Vs. Gulzari Lal Agrawal and Sons](#) , [COMMISSIONER OF INCOME TAX Vs. GRAMIN SADHAN, Commissioner of Income Tax Vs. Jai Durga Construction Co.,](#) and [Dwarka Nath Vs. Income Tax Officer, Special Circle D-ward, Kanpur and Another,](#) in support of submissions made on behalf of the Petitioner.

9. On the other hand it is submitted on behalf of the Respondents that the Petitioner decided to file a revisional application under the provisions of Section 264 of the said Act instead of preferring appeals against the impugned orders passed by the Respondent No. 2. Drawing the attention of this Court towards explanation: 1 of Sub-section (5) of Section 264 of the said Act, it is submitted by him that an order of the Respondent No. 1 declining to interfere for the purpose of the above aforesaid section, be deemed not to be an order prejudicial to the Assessee. As a result, it was not open for the Petitioner to challenge the impugned orders by way of filing this writ application.

10. It is also submitted on behalf of the Respondents that there was no proof before the Respondent authorities that the profit and loss accounts and the balance sheets had been prepared and audited on August 30, 1993 and August 30, 1994 respectively and the respective auditor's reports were obtained on the aforesaid dates.

11. It is further submitted on the behalf of the Respondents that taking in consideration the accounting years under reference, the corresponding assessment years of 1993-94 and 1994-95 ended on March 31, 1993 and March 31, 1994 respectively. Therefore, there was no error on the part of the Respondents in coming to a finding that the returns under reference were filed after the expiry of one year from the end of the assessment years concerned.

12. It is submitted on behalf of the Respondents that in accordance with the provisions of Sub-section(9) of Section 139 of the said Act the returns submitted by the Petitioner company were defective for the reasons mentioned here in above and in accordance with the provisions of Sub-section (9) of Section 139 of the said Act such defects could be rectified within the period of 15 days from the date of such intimation.

13. Having heard the learned Counsels appearing for the respective parties at length and after giving my anxious consideration to the facts and circumstances of this case I find that it is an admitted position that the Petitioner company filed revisional applications under the provisions of Section 264 of the said Act against the impugned orders passed by the Respondent No. 2 u/s 271B relating to the assessment years 1993-94 and 1994-95 respectively. In connection whereof a consolidated order dated May 26, 1997 was passed by the Respondent No. 1. Therefore, the first question which falls for consideration of this Court is that whether the order of the Respondent No. 1 under the provisions of Section 264 of the said Act being a quasi judicial act could be subject to prerogative writ of certiorari? In order to adjudicate the above issue, the provisions of Sub-section(1) and (5) together with explanation: 1 thereto of Section 264 of the said act are quoted below:

#### 264. Revision of other orders

(1) in the case of any order other than an order to which Section 263 applies passed by an authority subordinate to him, the Commissioner may, either of his own motion or on an application by the Assessee for revision, call for the record of any proceeding under this Act in which any such order has been passed and may made such inquiry or cause such inquiry to be made and, subject to the provisions of this Act, may pass such order thereon, not being an order prejudicial to the Assessee, as he thinks fit.

(2).....

(3).....

(4).....

(5) Every application by an Assessee for revision under this section shall be accompanied by a fee of twenty-five rupees.

Explanation 1. - An order by the Commissioner declining to interfere shall, for the purpose of this section, be deemed not to be an order prejudicial to the Assessee.

14. In accordance with the above provisions an Assessee could apply to the Respondent No. 1 to revise the order of his subordinate officer, i.e. Respondent No. 2. So the orders made thereunder should satisfy the well settled tests of "judicial act" and consequent thereupon and the same should be subject to prerogative writ of certiorari.

15. Reference may be may to the decision of Dawarakanath (supra). In the above case the Hon"ble Supreme Court decided the above principles of law in course of examining the provisions of Section 33A of the Indian Income Tax Act, 1922 which were pari materia to the provisions discussed hereinabove.

16. The impugned orders were passed with regard to the assessment years 1993-94 and 1994-95. The above assessment years ended on March 1994 and March 1995 respectively and admittedly the respective returns under reference were filed within one year from those dates. Admittedly, the amended provision of Section 44AB came into force with effect from July 1, 1995, i.e. after the periods under reference. Therefore, the unamended provisions were inforce at the material point of time. In order to examine the provisions of Section 44AB (unamended) are quoted Below:

44 AB. Audit of accounts of certain persons carrying on business or profession Every person -

(a) carrying on business shall, if his total sales, turnover or gross receipts, as the case may be, in business exceed or exceeds forty lakh rupees in any previous year; or

(b) carrying on profession shall, if his gross receipts in profession exceed ten lakh rupees in any previous year.

get his accounts of such previous gear audited by an accountant before the specified date and obtain before that date the report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed:

[provided that this section shall not apply to the person, who derives income of the nature referred to in Section 44AC or Section 44B or Section 44AB or Section 44BBA or Section 44BBB, on and from the 1st day of April, 1 985 or, as the ease may be, the date on which the relevant section came into force, whichever is later:

Provided further that] in a case where such person is required by or under any other law to get his accounts audited, it shall be sufficient compliance with the provisions of this section if such person gets the accounts of such business or profession audited under such law before the specified date and obtains before that date the report of the audit as required under such other law and a further report in the form prescribed under this section.

Explanation- For the purpose of this section,-

(i)"accountant" shall have the same meaning as in the Explanation below Sub-section (2) of Section 288;

(ii)"specified date", in relation to the accounts of the previous year relevant to an assessment year means, -

(a)where the Assessee is a company, the 31st day of December of the assessment year;

(b)in any other case, the 31st day of October of the assessment year.]

(Emphasis supplied)

17. In the instant case the Petitioner company got the accounts for the assessment years 1993-94 and 1994-95 respectively audited by an accountant and obtained report of such audit in form No. 3CD before the specified dates i.e. before December 31, 1993 and November 30, 1994 respectively. Therefore, the Petitioner company complied with the above provisions.

18. For examining the decision making process of the Respondents with regard to arriving at a finding that the Petitioner company had failed to furnish the returns in question within time, the provisions of Sub-section (4) of Section 139 are quoted below:

(4) Any person who had not furnished a return within the time allowed to him under Sub-section (1), or within the time allowed under a notice issued under Sub-section(1) of Section 142, may furnish the return for any previous year at any time before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment, whichever is earlier:

provided that where the return relates to a previous year relevant to the assessment year commencing on 1st day of April, 1988, or any earlier assessment year, the reference to one year aforesaid shall be construed as reference to two years from the end of the relevant assessment year.

(Emphasis supplied)

19. The Petitioner company had not furnish a return within the time allowed i.e. within December 31, 1993 and within November 30, 1994. But the Petitioner company furnished the return for the periods under reference on December 14,

1994 and August 29, 1995, i.e. before the expiry of one year from the end of the relevant assessment years, i.e. on March 1994 and March 1995 respectively. Therefore, the Petitioner complied with the above provisions also.

20. I do not find any substance on the submissions made on behalf of the Respondents that the provisions of Sub-section (9) of Section 139 of the said Act gave any discretionary power upon the Respondents for condoning the alleged delay in furnishing the returns under reference.

21. In view of the discussions and observations made herein above the impugned orders dated June 19, 1996 and August 21, 1996 passed by the Respondent No. 2 as also the order dated May 26, 1997 passed by the Respondent No. 1 are quashed and set aside.

22. This writ application is, thus, dispose of.

23. There will be, however, no order as costs.

Urgent Photostat certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.