

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'SMC', NEW DELHI**

Before Sh. N. K. Saini, Accountant Member

ITA No. 3386/Del/2016 : Asstt. Year : 2010-11

Dy. Commissioner of Income-tax, Circle-1, Ghaziabad	Vs	Sh. Alok Garg, R-11/125, Raj Nagar, Ghaziabad
(APPELLANT)		(RESPONDENT)
PAN No. AARPG7151K		

**Assessee by : Sh. Somil Aggarwal, Adv. &
Sh. Deepesh Garg, Adv.
Revenue by : Sh. Amrit Lal, Sr. DR**

Date of Hearing : 16.05.2017	Date of Pronouncement : 20.06.2017
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ORDER

This is an appeal by the department against the order dated 21.03.2016 of Id. CIT(A), Aligarh.

2. The only grievance of the department in this appeal relates to the deletion of penalty levied by the AO u/s 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as the Act)

3. Facts of the case in brief are that the assessee was a civil contractor who had undertaken contract work in Himachal Pradesh and Haryana and filed the return of income declaring an income of Rs.10,44,000/-. Later on, the case was selected for scrutiny. The AO during the course of assessment proceedings, analyzed the facts in detail and came to the

conclusion that books of account maintained by the assessee were not reliable. He estimated the profit of the assessee by applying net profit rate of 8% on the total turnover declared by the assessee. Accordingly, income was assessed at Rs.41,09,613/- as against the returned income of Rs.10,44,000/-. The AO initiated the penalty proceedings u/s 271(1)(c) of the Act and held that it was a case of deliberate concealment of income and furnishing of inaccurate particulars of income. The AO imposed the penalty of Rs.14,20,911/- u/s 271(1)(c) of the Act.

4. Being aggrieved the assessee carried the matter to the Id. CIT(A) and furnished the written submissions which is incorporated in para 4 of the impugned order and is reproduced verbatim as under:

“1. Auditors report, Profit & Loss A/c and Balance Sheet were filed with Ld. A. O. The Audited books of accounts along with bills and vouchers were produced before Ld. A.O. But the Ld. A.O. has rejected books of accounts and made the addition on estimate basis, where the net profit rate was estimated @ 8% of contract business.

2. Assessee made cash purchases only to the tune of 2.40 % of the total purchases as per Audited P & L A/c. Ld. A. O. did not refute the fact of cash purchase of 2.40 %.

3. Finding of the A. O. if the assessee pays the amount in cheque to a party, he would just pay the whole amount by cheque to the same party. On the basis of findings, based of surmises, then A. O. was of the view that the intention of the assessee to circumvent the provisions of Section 40A(3) and to inflate its purchase bills. The Ld. A.O. had not proved any purchase to be bogus nor any contrary confirmation from any

creditor has been brought on record. Purchases are reflected in audited P & L A/c and are comparable with purchases in earlier years assessed u/s 143(3).

4. Assessee made labour payments for semi skilled and skilled labour in Himachal Pradesh and hilly and tough terrains at prevailing market rate as per business exigency. All payments were genuine and duly recorded in Audited books of accounts. Total labour payments reflected in Audited P & L A/c and are comparable with total labour payments in earlier years assessed u/s 143(3).

5. Assessee has shown actual closing stock duly supported by bills and vouchers and tallying with actual stock taken duly reflected in Audited P & L A/c. Assessee maintained branch wise details of closing stock but Ld. A. O. never required branch -wise closing stock from assessee. Stock level was comparable with level in earlier years assessed u/s 143(3).

6. On the basis of discrepancy, (based on assumption and surmises only), in the books of accounts the then A.O. computed the profit at 8% of the total turnover, as against assessed NP rate of 2.46% u/s 143(3) for A.Y. 2009-10 and assessed NP rate of 2.30% u/s 143(3) for A.Y. 2007-08. Penalty u/s 271(1)(c) of the I. Tax Act was initiated separately. Assessee hereby submits detailed N.P. rate analysis in case of Assessee u/s 143(3) since A.Y- 2001-02 to A.Y. 2010-11 along with copy of assessment orders, Computation of Income, Audited Profit & Loss Account which clearly shows that assessee earns net profit of around 2.25% to 2.50% of total turnover (net of material supplied by Government), During A.Y. 2010-11 also assessee has shown N.P. at 2.26% as per Audited Profit & Loss A/c. It is clear

that assessee has neither concealed any income nor has furnished any in accurate particulars.

7. Aggrieved with the order of the A.O., the assessee filed an appeal before CIT(A), on 31.03.2013 who vide its order Appeal No 289/2012-13 / GZB /182 dated 15.10.2014 (copy enclosed) dismissed the appeal of the assessee and confirmed the action of the A.O. of rejecting the book result and estimating income at 8% of contract receipt. Assessee has filed Appeal before Honorable ITAT, New Delhi on 29.12.2014 against the order of Ld. CIT (A), Ghaziabad. Copy enclosed along with copy of intimation to Ld. A. O. on 30.12.2014. Case before Ld. Hon'ble & ITAT is scheduled for hearing on 10.05.2016. Penalty order u/s 271(1)(c) may be kept in abeyance till disposal of quantum appeal by Hon'ble ITAT, New Delhi.

8. In response to notice u/s 274 read with Section 271 of the I. T. Act, assessee submitted reply dated 05.04.2013. Copy enclosed. It was submitted to Ld. A.O. that income is assessed based on purely estimation basis and not on cogent factual submissions. It is not a concealment of income. It is merely an estimated addition. Assessee has neither consciously made the concealment nor furnished inaccurate particular of income.

In the case of K. C. Builders vs Asstt. CIT (2004) 265 ITR 562 / 135 Taxman 461 (SC), the Hon'ble Supreme Court has mentioned that "In order that a penalty u/s 271(l)(c) may be imposed, it has to be proved that the assessee has consciously made the concealment or furnished inaccurate particulars of his income."

Also, in the case of CIT vs Ajaib Singh & Co. [2002] 253 ITR 630 (Punjab & Haryana), it is mentioned that "Merely

because certain expenses claimed by the assessee are disallowed by an authority it can not mean that the particulars furnished by the assessee are wrong."

*"We also place reliance on the judgment of the **Hon'ble Supreme Court in the case of CIT vs. Reliance Petro Products (P) Ltd (322 ITR 158 (SC). Supreme court held in para 10 and 11 of the order (copy enclosed).** It was tried to be argued that the falsehood in accounts can take either of the two forms; (i) an item of receipt may be suppressed fraudulently; (ii) an item of expenditure may be falsely (or in an exaggerated amount) claimed, and both types attempt to reduce the taxable income and, therefore, both types amount to concealment of particulars of one's income as well as furnishing of inaccurate particulars of income. We do not agree, as the assessee had furnished all the details of its expenditure as well as income in its Return, which details, in themselves, were not found to be inaccurate nor could be viewed as the concealment of income on its part. It was up to the authorities to accept its claim in the Return or not. Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the Revenue, that by itself would not, in our opinion, attract the penalty under Section 271(l)(c), If we accept the contention of the Revenue then in case of every Return where the claim made is not accepted by Assessing Officer for any reason, the assessee will invite penalty under Section 271(l)(c). That is clearly not the intendment of the Legislature.*

*In this behalf the observations of this Court made in **Sree Krishna Electricals v. State of Tamil Nadu & Anr. [(2009) 23VST 249 (SC)]** as regards the penalty are apposite. In the aforementioned decision which pertained to the penalty proceedings in Tamil Nadu General Sales Tax Act, the Court*

had found that the authorities below had found that there were some incorrect statements made in the Return. However, the said transactions were reflected in the accounts of the assessee. This Court, therefore, observed:

"So far as the question of penalty is concerned the items which were not included in the turnover, were found incorporated in the appellant's account books. Where certain items which are not included in the turnover are disclosed -in the dealer's own account books and the assessing authorities include these items in the dealer's turnover disallowing the exemption, penalty cannot be imposed. The penalty levied stands set aside."

So, in view of the above said facts, judicial pronouncements and reasonable cause and in the interest of natural justice, you are requested not to impose penalty u/s 271 (1)(c) of I. Tax Act.

Ld. AO has erred in law & facts not to have considered above submissions while framing order u/s 271(1)(c) of the I. Tax Act, 1961.

9. Ld. AO has also erred in law and has acted arbitrarily and on surmises by not following Sec. 275(1)(a) of I. Tax Act by passing an undated order of levy of penalty u/s 271(1)(c) in spite of CIT(A) order is subject matter of appeal before Income Tax Appellate Tribunal u/s 253 and request was made to Ld. A. O, to keep penalty in abeyance till decision of appeal.

10. Wages and Salary registers, closing stock, payments in cash are genuine as per audited books of accounts. Signatures in wages and salary registers are taken by the site personnel for the payments which are all genuine. All

payments are recorded in assessee's audited books of accounts. Ld. A. O. assumptions that wages and salary registers, closing stock and payments in cash being not subject to verification has been discussed, it is a case of deliberate concealment of income by furnishing inaccurate particulars, therefore penalty u/s 271(1)(c) is clearly attracted in this case is bad in law and on facts. No positive contrary fact has been brought on record by Ld. A. O.

11. The assessee relies on the Allahabad High Court decision in I. Tax Appeal No.79 of 2008 in the case of Naresh Chand Agarwal vs CIT. In this case the assessee-appellant was engaged in the business of civil contract in his proprietary set up under the name and style M/s Naresh Chandra & Engineers". The assessment was completed under Section 143(3) of the I. Tax Act by rejecting the books of accounts u/s 145 of the I. Tax Act. Addition was made by computing the net profit rate @8%. The addition was upheld by the appellate authorities. Being aggrieved the appellant filed the appeal with Allahabad High court. Allahabad High court held that in the penalty proceedings the authorities must consider the matter afresh as the question has to be considered from a different angle. Allahabad High court further held that in the instant case nothing was concealed by the assessee. It was the A. O. who has rejected the books of accounts in the second round and applied 8% net profit rate prescribed under the Section 44 AD. In the instant case, the turnover is more than 40 lacs, so section 44AD is not applicable, nonetheless the A.O. is inspired with the provision of Section 44AD and made the addition by estimating the net profit rate @8%. Rejection of the books of accounts allowed the A.O. to make the addition on estimate basis. When the addition is made on estimate basis, no penalty under Section 271(1)(c) of the Income Tax Act can be imposed as per the ratio laid down in the case of CIT vs Arjun Prasad Ajit Kumar (2008) 214 CTR (All) 355. Copy of Allahabad High Court order in Income Tax Appeal No. 79 of 2008 is enclosed.

12. In respect of ground no 8, without prejudice, tax difference as per assessed by Ld. A.O. and as per ITR filed by assessee is as follows:-

<i>Tax due as assessed u/s 143(3) (Copy of Rectification Order passed u/s 154 to rectify mistake in notice of demand u/s 156</i>	<i>11,35,454/-</i>
<i>Less: Tax due declared by assessee in ITR (Copy enclosed)</i>	<i>2,22,716/-</i>
<i>Tax Difference (100%)</i>	<i>9,12,738/-</i>
<i>150% of Tax difference</i>	<i>13,69,107/-</i>

Without prejudice, Ld. A.O. has erred in calculation of penalty @150% at Rs 14,20,911/- in place of Rs 13,69,107/- as above. Arithmetical error may be deleted.

13. Without prejudice, penalty of 150 % at Rs 14,20,911/- is high pitched and should be deleted.

14. All grounds of appeal and written submissions are without prejudice to each other.

Prayer :

In view of the above facts and judicial pronouncements by Supreme Court and jurisdictional Allahabad High Court, it is prayed that the penalty order u/s 271(1)(c) passed by Id A.O. deserves to be quashed and cancelled being illegal, untenable on facts and in violation of principle of natural justice and such other relief may be granted as your honour deem fit.”

5. The Id. CIT(A) after considering the submissions of the assessee deleted the penalty by observing in para 5.1 of the impugned order as under:

“In the assessment proceedings, the AO had rejected the books on the basis of certain findings. With regard to each of such findings, the appellant in his written submission has given detailed explanation. In my opinion, the observations made by the AO in the assessment order may be good enough to create a suspicion about accuracy of books of accounts but the same are not sufficient to establish a clear cut case of concealment. Further, as per Explanation-2 to section 271(1), if the explanation given by the assessee is bonafide, penalty u/s 271(1)(c) cannot be imposed. In this case, there is no finding that the explanation given by the appellant is not bonafide.

The addition made in the assessment order is based on estimation of income @ 8% of the total turnover. Such estimation would not amount to concealment, as concealment involves some positive action leading to suppressions of material facts. There is no such findings in this case.

In view of the above, in my opinion, this is not a fit case for imposition of penalty u/s 271(1)(c). Accordingly, I hereby cancel the penalty of Rs. 14,20,911/- imposed by the AO u/s 271(1)(c).”

6. Now the department is in appeal. The ld. DR strongly supported the penalty order passed by the AO and reiterated the observations made in the said order dated 26.02.2015.

7. In his rival submissions the ld. Counsel for the assessee reiterated the submission made before the authorities below and further submitted that the income of the assessee was determined by the AO on estimate basis by applying the net profit rate of 8% which was reduced by the ITAT on the appeal of the assessee in ITA No. 7023/Del/2014 vide order dated 21.04.2017 and the AO was directed to determine the income by applying net profit rate of 3%. It was accordingly submitted that the

income was estimated only by applying net profit rate, so there was no concealment or furnishing of inaccurate particulars of income by the assessee. It was further submitted that in similar circumstances, the penalty was deleted by the various benches of the Tribunal and copies of the following orders were furnished:

- *ITO Vs Smt. Purnima Devi Gupta (2004) 3 SOT 753 (ITAT Jodh)*
- *ITO Vs M/s Honest Construction Co. in ITA No. 3268/Ahd/2008 order dated 03.06.2010*

8. I have considered the submissions of both the parties and carefully gone through the material available on the record. It is noticed that an identical issue has been adjudicated in the case of ITO Vs Smt. Purnima Devi Gupta (supra) wherein it has been held as under:

“The assessee had shown gross receipts of Rs. 10,96,370 from bus plying business which were estimated by the AO at Rs. 16,95,506 and the AO determined the income of the assessee by applying net profit rate of 33 per cent. The action of the AO was confirmed by the CIT(A), however, the Tribunal estimated the gross receipts at Rs. 15,00,000 and directed the AO to apply a net profit rate of 20 per cent subject to depreciation and interest to third parties. From the above facts it would be clear that there was an estimate at the level of the AO as well as at the level of Tribunal in respect of receipts as well as net profit rate. The above facts clearly show that the income of the assessee was estimated and nothing has been brought on record by the AO that the assessee concealed any particulars of income or furnished inaccurate particulars of income. It cannot be said that the addition made in the hands of the assessee was on account of any concealment by the assessee. Therefore, the provisions of s. 271(1)(c) were not applicable to the facts of the present case. It cannot be said that in the case of assessee there was any fraud or

gross or willful neglect to return the correct income. In that view of the matter also the penalty was not leviable under s. 271(1)(c). No penalty under s. 271(1)(c) was leviable in the facts of the present case because in this case the income had been estimated and there was no concrete evidence that the assessee furnished inaccurate particulars of income or concealed particulars of its income.

9. In the present case also as we have already pointed out in the former part of this order that the income of the assessee was estimated by the AO and also by the ITAT by applying different rates of net profit. Therefore, by respectfully following the aforesaid referred to order of the Co-ordinate Bench of the ITAT, Jodhpur, the penalty levied by the AO u/s 271(1)(c) of the Act was rightly deleted by the Id. CIT(A). I do not see any merit in this ground of the departmental appeal.

10. In the result, the appeal of the department is dismissed.

(Order Pronounced in the Court on 20/06/2017)

Sd/-
(N. K. Saini)
ACCOUNTANT MEMBER

Dated: 20/06/2017

Subodh

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR