

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: BENCH "E" NEW DELHI**

**BEFORE SRI R.K.PANDA, ACCOUNTANT MEMBER
AND
SMT. BEENA A PILLAI, JUDICIAL MEMBER**

ITA No.280/Del/2014

A.Y. 2008-09

&

ITA No.281/Del/2014

A.Y. 2009-10

Nav-Yug Sewing Machine Co.Ltd. vs. ACIT, Circle 13(1)
E 47/13, Okhla Industrial Area New Delhi
Phase II
New Delhi 110 020

PAN: AABCN4225G

(Appellant)

(Respondent)

Appellant by: Sri Surjeet Singh, CA

Respondent by: Sh. S.R.Senapati, Sr.DR

Date of hearing: 22.02.2018

Date of Pronouncement: 27.02.2018

ORDER

PER BEENA A PILLAI, JUDICIAL MEMBER

The present penalty appeals have been filed by assessee against order dated 30/10/13 passed by Ld.CIT (A)-14, New Delhi for assessment year 2008-09 and 2009-10 on the following grounds of appeal:

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The order of CIT(A)-XVI confirming penalty u/s 271(1)(c) of Income Tax Act, 1961 is bad in law and on facts on following grounds:

1. Because on the facts & circumstances of the case, CIT(A) has erred in concluding that surrender of Rs 15,45,517/- [(consisting of (i) Excess claim of Electricity & water Exp Rs 84,278), (ii) Excess Claim of House Tax Rs 77,501 & (iii) Excess claim of depreciation on Building Rs 13,83,783 on E-41/2-3, okhla Industrial Area Ph-I pertaining to the portion not in use)] made by the appellant is not suo moto, voluntarily in bonafide manner.

2. Because queries raised in notice u/s 142(1) dt 15.01.2010 did not have either the correlation or the cause and effect relationship between raising of queries and making of surrender on 27.10.2010 such that the surrender is triggered by or the result of the queries raised. Thus conclusion drawn by CIT (A) on this basis is erroneous that appellant's surrender was motivated and influenced by the queries of questionnaire dt 15.01.2010.

3. Because there is neither any material on record brought by revenue to suggest that surrendered amount or explanation of the appellant is untrue nor there is any detection by the revenue or information in the possession of the revenue which led to a conclusion that there was a detection by revenue of concealment as the additions rested only on surrenders made by the appellant just at the initial "query stage."

4. Because CIT(A) erred in confirming penalty on addition of Rs 1,07,918 on wrong appreciation of facts recorded in assessment

order, penalty order and appellate order describing the amount as interest charges for building under construction failing to note that same is interest debited to P&L to repay personal loan directors. Further finding of CIT(A) that surrender of this sum is not voluntary and bonafide is erroneous since surrender was not correlated to the query.

5. Because CIT(A) erred in holding that surrender of loan processing fee Rs 2,69,248 is not voluntary in bonafide manner just because it was queried by the AO, as surrender was made prior to detection by AO at initial stage of raising query.

6. Because penalty on addition of Rs 2,69,248 was confirmed by CIT(A) on wrong appreciation of facts stating it to be loan processing fee for building under construction while in fact the amount included Rs 1,96,930/-loan processing fee for loan for land purchase and Rs 72,618 loan processing fee for director's personal loan.

7. Because finding of CIT(A) is perverse & erroneous in holding that the appellant has failed to prove its explanation bonafide ignoring following actions of appellant which establish the bonafides of appellant for surrender of income made :-

a) The appellant's act of including the surrendered income in its account of FY 09-10 as income.

b) The appellant's act of disclosing in Accounts of FV 09-10 not only the income pertaining to A.V 08-09 which was under assessment but also disclosing the income pertaining to A.V 09-10 which was not selected for scrutiny assessment till such inclusion during finalization of audit on 06.09.2010 and also disclosing the income pertaining to

A.V 07-08, the assessment of which was already completed u/s 143(3) on 11.12.2009

c) The appellant's act of surrendering even those expenses as income in respect of which no query was made i.e. expenses on Trademark Rs 1,54,554, the penalty, in respect of which has been deleted by CIT(A).

d) The appellant's act of offering for tax ,income in the very first hearing of the case or at initial stage of query. Thus it is not the case that appellant was "cornered" & 'left with no option" & then it came up for surrender of income .

8. Because CIT(A) failed to appreciate bonafides of the appellant & fact that by the time mistakes were detected the time to file revise return was expired and the return of appellant was not revisable u/s 139(5) and the only option left with appellant was to offer the income during the assessment proceedings, which were open.

9. Because CIT(A) has wrongly concluded that the surrender is not bonafide ignoring the fact that if assessment proceedings were not taken up, the appellant at its own was ready to offer the surrendered income of Rs 15,45,517 in accounts of FY 09-10 along with incomes of next year pertaining to next year i.e AY 09-10 and has offered to tax ,incomes pertaining to completed assessment for AY 07-08 in the astt year 2010-11 as prior year income.

10. Because CIT(A) wrongly confirmed penalty on addition of Rs 2550/- being excess claim of donation to Baba Fateh Singh Sewa Jatha which was neither discussed in Assessment order nor in the

penalty order merely on the ground that appellant did not prefer appeal against the addition and hence accepted the addition.

11. Because CIT(A) has confirmed the penalty on the basis of case laws which are distinguishable and different from facts & circumstances of the appellant.

12. The appellant craves to add, delete, amend, modify, re-word any ground or grounds of appeal.”

ITA No. 281/del/2014

The order of CIT(A)-XVI confirming penalty u/s 271(1)(c) of Income Tax Act, 1961 is bad in law and on facts on following grounds:

- 1. Because CIT(A) erred in holding that the surrender of income Rs.91,12,921 made on 6.7.2011 by the appellant in the first hearing of the case prior to issuance of questionnaire u/s 142(1) of Assessment Year 2009-10 is not voluntary and bonafide, as it was after completion of assessment for Assessment Year 2008-09 on 10.12.2010.*
- 2. Because CIT(A) erred in holding explanation of the appellant that expenses surrendered Rs.91,12,921 were detected during audit of accounts of FY 2009-10, not bonafide as audit finalisation of FY 2009-10 on 6.9.2010 is after AO's query in Assessment Year 08-09 on 15.1.2010.*
- 3. Because CIT(A) erred in holding explanation of the appellant not bonafide regarding the disclosure of surrendered amount of Rs.91.12.921 as 'prior year income' in accounts of FY 09-10*

audited on 6.9.2010 despite being prior to assessment of Assessment Year 2008-09 just because it was after queries of questionnaire dt. 15.1.2010 u/s 142(1) of Assessment Year 08-09.

- 4. Because CIT(A) wrongly concluded that appellant's surrender and inclusion of income in accounts of FY 09-10 was motivated and influenced by the queries raised to appellant during Assessment Year 08-09 proceedings ignoring the fact that queries neither have any correlation nor had any cause and effect relationship with the surrender and inclusion made in accounts of FY 09-10.*
- 5. Because there is neither any material on record brought by revenue to suggest that surrendered amount or explanation of the appellant is untrue nor there is any detection by the revenue or information in the possession of the revenue which led to a conclusion that there was a detection by revenue of concealment as the additions rested only on surrenders made by the appellant just at the initial "query stage."*
- 6. Because finding of CIT(A) is perverse & erroneous in holding that the appellant has failed to prove its explanation bonafide ignoring following actions of appellant which establish the bonafides of appellant for surrender of income made :-*
 - a) The appellant's act of including the surrendered income in its account of FY 09-10 as income and making necessary provision for tax as well on the amount of surrendered income included in accounts on 6.9.2010 when the case for*

Assessment Year 09-10 was not even selected for assessment u/s 143(3) and had the case not got selected for scrutiny, the company was in process to offer and pay entire tax at its own in Assessment Year 10-11.

b) The appellant's act of paying tax on income in ITR of Assessment Year 10-11 even for that year whose assessment was completed i.e. for Assessment Year 07-08 i.e. by offering income by including in accounts for FY 09-10 to correct the detected mistakes during the course of audit finalised on 6.9.2010.

c) The appellant's act of surrendering even those expenses as income in respect of which no query was made i.e. expenses on Trademark Rs 1,27,650 and interest on borrowed capital for purchase of land 59/18, kalkaji Rs.65,98,614/-.

d) The appellant's act of offering for tax, in the very first hearing of the case before even the issuance of questionnaire of AO or raising of query. Thus it is not the case that appellant was 'cornered' and 'left with no option' and then it came up for surrender of income.

7. Because CIT(A) erroneously confirmed the findings of AO that the ITR for Assessment Year 09-10 was revisable and was not time barred for revision, failing to note the fact that original ITR filed late after due date 30.9.2009 on 1.10.2009 and was not revisable u/s 139(5).

8. Because CIT(A) has erroneously confirmed inconsistent act of AO of imposing penalty relating to additions u/s 43B, whereas in

one Assessment Year 08-09, the penalty was not levied on the ground that two views are possible while on similar additions in Assessment Year 09-10, the same has been levied in clear ignorance of judgment as settled by Madras High Court in CIT vs. M/s MSK Constructions P Ltd. (2008) 296 ITR 18 and Hon'ble SC's decision in case of Reliance Petroproducts P Ltd. (2010) 322 ITR 158 (SC).

9. Because CIT(A) has confirmed the penalty on the basis of case laws which are distinguishable and different from facts and circumstances of the appellant.

10. The appellant craves to add, delete, amend, modify, re-word any ground or grounds of appeal.”

2. Brief facts of the case are as under:

The assessee is a company engaged in the business of whole sale trading of imported industrial sewing machines and their related parts. Assessment under section 143 (3) for assessment years under consideration was completed after making additions to the returned income on the basis of the surrendered income made by assessee during the assessment proceedings. The surrender of income was in respect of capital expenses, wrongly claimed as revenue expenses which were detected by the statutory auditors of assessee during the audit of accounts of subsequent assessment year being financial year 2009-10 relevant for assessment year 2010-11. Assessee by way of rectification included wrongly charged revenue expenses relating to assessment years 2007-08, 2008-09

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and 2009-10 in the profit and loss account of assessment year 2010-11 as prior period income by reversing the expenses.

2.1. It has been submitted by Ld.AR that assessee did not have option to revising its income for assessment year 2008-09 and 2009-10 for offering the detected income because the time period for filing the revised return for the assessment years under consideration had already lapsed under section 139 (4) of the Act.

However as the assessment proceedings for assessment years under consideration were taken up, assessee instead of offering the tax in assessment year 2010-11 as “prior year income”, offered the tax related to the income in the respective assessment year by way of surrender during the course of assessment proceedings in the very 1st hearing.

2.2. The Ld.AR submitted the details of income surrendered as under:

assessment year	income surrendered
2008-09	Rs. 17, 00, 071+ 3, 77, 166
2009-10	Rs. 91, 12, 921 + 84, 215

Ld.AR submitted that the said income was surrendered vide its letter dated 27/10/10 , 08/12/10 and 06/07/11, 24/11/11.

Ld. AO after accepting the surrendered income imposed penalty under section 271 (1) (c) of the Act for furnishing of inaccurate particulars of income.

2.3. Aggrieved by the imposition of penalty, assessee preferred appeal before Ld. CIT (A). for assessment year 2008-09.

2.4. The Ld. CIT (A) deleted the penalty to an extent of Rs.1,54,554/- on account of surrender of expenses on trademark because no query was made by Ld. AO in the questionnaire issued along with a notice under section 142 (1) dated 15/01/10 holding that the surrender with respect to this expense was voluntary and in bona fide manner. However in respect of the other income surrendered, Ld. CIT (A) confirmed the penalty levied.

3. Ld. CIT (A) deleted the penalty in the year under consideration.

3.1. Aggrieved by the order of Ld. CIT (A) assessee is in appeal before us for both the assessment years.

3.2. As the issues are common for both the years under consideration these are disposed of by way of common order.

3.3. Ld.AR submitted that the mistake has occurred inadvertently and there was no intention of assessee to file inaccurate particulars of income. He submitted that merely because the surrender of the amount was after the receipt of the questionnaire could not lead to an inference that it was not voluntary in the absence of any material on record to suggest so. He placed reliance upon various decisions of High Court as well as Coordinate Benches of this Tribunal where surrender made during the course of survey by assessee by way of furnishing revised return of income declaring additional income was considered to be voluntary in nature.

3.4. He submitted that assessee has paid tax on the surrendered income immediately during the assessment proceedings.

3.5. Arguing on the merits of the addition of surrendered income Ld. AR submitted that these were mistakes that crept into the accounts, due to inadvertence by accountant.

3.6. On the contrary Ld. DR placed reliance upon the order of the authorities below. He submitted that assessee having expert persons for preparing audited accounts mistakes are not acceptable as they are aware about various provisions and allowances/disallowances under Act, in respect of income for the year under consideration. He thus submitted that the order of Ld. CIT (A) should be upheld.

3.7. We have perused the submissions advanced by both the sides in the light of the records placed before us.

3.8. Admittedly assessee has revised its income by way of surrender during the assessment proceedings and due taxes have been paid on the surrendered income. Further upon considering the nature of additions on which the income has been surrendered it is observed that these are various expenses claimed by assessee as revenue in nature which were actually capital in nature.

3.9. It is observed that Ld. CIT (A) for assessment year 2008-09 did not include expenses on trademark for the purposes of computing penalty as in the questionnaire issued for assessment year 2008-09 there was no query regarding this item. Whereas for assessment year 2009-10 there is no such consideration granted by Ld. CIT (A) though the questionnaire issued for assessment year 2009-10 dated 11/07/11 which is placed at page 77 of the paper book is identical to the questionnaire issued by Ld. AO for assessment year 2008-09 dated 15/01/10 placed at page 31 of paper book.

3.10. Further it is observed that the additions made by Ld. AO was simply based on the surrender without even having been discussed the items that has been surrendered by assessee. No doubt that assessee has filed a reply for surrender of income after the issue of questionnaire for both the years under consideration however this does not establish that anything contrary to the intention or bona fides belief of assessee. In the present case assessee could not even

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rectify the mistakes as the time period for filing a revised return had already lapsed. In fact assessee was preparing to offer the excess claimed expenditure as income for assessment year 2010-11 as prior period income. It was while preparing the audited accounts for assessment year 2010-11 that assessee received notice of scrutiny for assessment years under consideration.

3.11. Thus we are of the considered opinion that the mistake that had crept in while preparing the audited accounts for the years under consideration were bona fide mistakes and deserves to be deleted by following the decision of Hon'ble Supreme Court in the case of CIT vs. Reliance Petro Products reported in (2010) 322 ITR 158 (SC).

3.12. Accordingly the grounds raised by assessee for both the assessment years stand allowed.

4. In the result appeals filed by assessee for assessment year 2008-09 and 2009-10 stand allowed.

Order pronounced in the open court on 27.02.2018.

Sd/-

(R.K.PANDA)
ACCOUNTANT MEMBER

Sd/-

(BEENA A PILLAI)
JUDICIAL MEMBER

Dt. 27th Feb., 2018

*mv

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Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

- TRUE COPY -

By Order,

ASSISTANT REGISTRAR
ITAT Delhi Benches