

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर  
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष  
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA Nos. 951, 952 & 953/JP/2017  
निर्धारण वर्ष / Assessment Year : 2011-12

Roshni Devi, 445, Lions Lane, Khatipura, Jaipur.	बनाम Vs.	Income Tax Officer, Ward 3(1), Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AJTPD 9081 E		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri N.S. Vyas (Adv)  
राजस्व की ओर से / Revenue by : Smt. Poonam Roy (DCIT)

सुनवाई की तारीख / Date of Hearing : 10/05/2018  
उदघोषणा की तारीख / Date of Pronouncement : 16/05/2018

आदेश / ORDER

PER BENCH:

These are the three appeals filed by the assessee against the respective orders of the Id. CIT(A)-I, Jaipur dated 05/09/2017 for the A.Y. 2011-12 wherein the assessee has challenged the action of the Assessing Officer in levying the penalty U/s 271(1)(c), 271A and 271B of the Income Tax Act, 1961 (in short the Act). All these appeals were heard together and the same are being disposed off by this consolidated order.

2. Earlier, all these appeals were dismissed in limine for want of prosecution by the Coordinate Bench vide its order dated 09/01/2018, which has subsequently been recalled vide M.A. order dated 09/04/2018. Hence these appeals have come up before us.

3. Regarding levying of penalty U/s 271(1)(c) of the Act, briefly stated, the facts of the case are that during the year under consideration, the assessee was engaged in the business of electronics items in the name and style of M/s Krishna Electronics and M/s Jharkhand Electric & Electronics. In respect of M/s Krishna Electronics, the assessee has received commission income from M/s Samsung India Ltd. for supply of CDS items and in M/s Jharkhand Electric & Electronics, the assessee carries out trading of electronic items for the local market. During the course of assessment proceedings, the assessee filed trading and profit and loss account of M/s Jharkhand Electric & Electronics showing net profit of Rs. 3,75,344/- on the total sales of Rs. 91,36,106/- showing the NP rate @ 4.11%. During the course of assessment proceedings, the assessee was asked to produce bills vouchers and bank account of his undisclosed business carried out in the name and style of M/s Jharkhand Electric & Electronics, which has not been disclosed in the return of income. It was also found that the cash deposits in the bank account are related to the said business being carried out by the assessee. As against the turnover of Rs. 91,36,106/-, the Assessing Officer worked out the turnover of Rs. 96,10,000/- and estimated the NP rate at 5% against 4.11% declared by the assessee and made addition of Rs. 4,80,500/- in the hands of the assessee. Separately, the penalty proceeding was initiated for concealing the particulars of income vide issuance of notice dated 28/11/2013 U/s 271(1)(c) of the Act.

4. The assessee has not preferred any appeal against the said additions made by the Assessing Officer hence the quantum proceedings have since attained finality. During the course of penalty proceedings, the Assessing Officer observed that the submission of the assessee towards

non levy of penalty is general in nature and not convincing for the reason that the assessee has not shown actual NP rate as well as actual turnover of her business in the return of income filed for the year under consideration. Accordingly, penalty @ 100% of tax sought to be evaded amounting to Rs. 73,022/- was levied on the assessee.

5. Being aggrieved, the assessee carried the matter in appeal before the Id. CIT(A), who has confirmed the said levy of penalty U/s 271(1)(c) of the Act.

6. Now the assessee is in appeal before us. During the course of hearing, the Id AR of the assessee has submitted that the return of income was filed in which the addition was made amounting to Rs. 4,80,500/- as per net profit discussed in the assessment order being the profit from Jharkhand Electric & Electronics which was not shown by the assessee by oversight in the return of income.

That during the assessment proceedings, it was stated by the petitioner that there is a profit of Jharkhand Electric & Electronics at Rs. 3,75,000/- on the total estimated sale of Rs. 91,36,106/- giving a net profit @ 4.11% on the basis of amount deposited with bank account amounting to Rs. 1,13,10,000/- but books were not maintained.

That the Id. ITO estimated the sale amounting to Rs. 96,10,000/- and estimated the net profit @ 5%, hence the income from Jharkhand Electric & Electronics so determined at Rs. 4,80,500/-, the same was added in the total income which was originally not shown by the assessee but on the basis of amount deposited in bank account.

In this respect, it is submitted that the petitioner filed the return showing the income of M/s Krishna Electronics which was only as commission which was received from M/s Samsang India Ltd. for supply of CSD items and income earned from business has been disclosed in the return of income at Rs. 2,45,630/-. The addition which was made on account of Jharkhand Electric & Electronics due to cash deposited of Rs. 1,13,10,000/- in the bank account maintained with Bank of Maharashtra during the year under consideration. The income which was earned on the basis of cash deposited in the bank account was Rs. 3,75,344/- on estimate basis because no regular books of accounts were maintained by the assessee for Jharkhand Electric & Electronics and the profit so estimated. Since that there was a bonafide mistake by the assessee not to disclose the income from Jharkhand Electric & Electronics. Under the circumstances, there is no part of income concealed or under stated and further the 1,05,256/- was added in estimated income on the basis of sales estimated on the basis of bank account @ 5%.

That as regard penalty u/s 271(1)(c), it has been held that in the matter of Dilip N Shroff Vs Jt. CIT (2007) 210 CTR (SC) 228 (2007) 291 ITR 519 SC by the Honorable Supreme Court that levy of penalty u/s 271(1) (c) of the IT Act, 1961 is not automatic and is a matter of discretion and the AO has to be fair and objective. It has been held in a recent judgement by the Honorable Supreme Court in the matter of CIT Vs Reliance Petroproducts Pvt. Ltd. (2010) 210 CTR (SC) 228 that where there is no finding that any details supplied by the assessee in its return of income are found to be incorrect or erroneous or false, there is no question of inviting the penalty u/s 271(1)(c). A mere making of false claim, which is not sustainable in law, by itself will not amount to furnishing inaccurate

particulars regarding the income of the assessee. Such claim made in the return of income cannot amount to furnishing inaccurate particulars. It has also been held by the Honorable ITAT Delhi Bench in the matter of Nikunj Jain Vs CIT that penalty u/s 271(1)(c) cannot be imposed because the assessee paid the due tax to buy peace and to avoid litigation. It has been held by the Hon'ble Supreme Court in the matter of M/s Price Waterhouse Coopers (P) Ltd. Vs Commissioner of Income Tax reported in (2012) 25 taxmann.com 400 (SC) that penalty should not be imposed where the error/mistake is bonafide. In a recently decided matter by the Honorable Bombay High Court in the matter of CIT-2 Vs M/s Sharad Fibres and Yarns Processors Ltd. reported in (2016) 40 ITD 91 (Bom.) that penalty should not be imposed where the error/mistake is bonafide.

It was held in following cases that agreed addition to income to purchase peace cannot amount to an admission constituting evidence of concealment in penalty proceedings:-

CIT Vs. Girish Devchand Rajani (2013) 33 Taxmann.com 174 (Gujarat)

CIT Vs MM Gujamgadi (2007) 162 Taxmann 211 (Kar)

CIT Vs Punjab Tyres (1986) 162 ITR 517 (MP)

CIT Vs. Jaswant Rai (1997) 142 CTR 49 (P&H)

CIT Vs Mecon Builders & Engineers (2001) 248 ITR 159 (Del.)

CIT Vs. Manjunatha Cotton & Ginning Factory (2013) ITRV-HC-KAR-093)

In the following cases it was also held that penalty u/s 271(1)(c) could not be levied where addition has been made on estimate basis:-

Surat Fashions Ltd. Vs ACIT (2011) ITRV-ITAT-AHD-134)

Narayansingh J Deora Vs ACIT (2011) ITRV-1TAT-MUM-28

On the basis of the above submissions, it is requested that the assessee has disclosed all the material facts in her return of income and no facts

have been concealed and no additional evidence have been put on record to prove that the assessee has concealed her income, it is therefore, requested to kind delete the penalty u/s 271(l)(c) of the IT Act, 1961 amounting to Rs. 73,022/-.

7. Per contra, the Id DR has submitted that it is a clear case of concealment of income as during the course of assessment proceedings, on pointed out by the AO, the assessee has come forward and disclosed the nature of cash deposit in her bank account which represents the business receipts arising out of business transactions pertaining to M/s Jharkhand Electric & Electronics. It was submitted that had the case of the assessee not picked up for scrutiny, the said income would have escaped taxation. Further, it was submitted that it is not a case of mere estimate of turnover and GP rate by the Assessing officer and thus the decisions relied upon by the Id AR are distinguishable. Further, she has relied on the orders of the lower authorities.

8. We have heard the rival contentions of both the parties and perused the material available on the record. The case of the assessee was selected for scrutiny assessment to examine the source of cash deposit of Rs 1.13 crores in the bank account maintained by the assessee. During the course of assessment proceedings, the assessee submitted that the cash deposits represents the business receipts arising out of business transactions pertaining to M/s Jharkhand Electric & Electronics and due to some inadvertent mistake, the same was not reported in the return of income originally filed. Thereafter, the assessee filed trading and profit and loss account of M/s Jharkhand Electric & Electronics showing net profit of Rs. 3,75,344/- on the total sales of Rs. 91,36,106/- showing the NP rate @ 4.11%. The AO however estimated the sale amounting to Rs.

96,10,000/- and estimated the net profit @ 5% and made an addition of Rs 4,80,500. It is therefore a clear case where the assessee has failed to report the business receipts in respect of her regular business activities while filing her return of income and subsequently, when the matter was selected for scrutiny, she has come forward and submitted the details of its trading and profit/loss account. The explanation of the assessee in not reporting the said business receipts in her original return of income by merely stating that the same was inadvertently not reported doesn't inspire any confidence in us. Hence, the levy of penalty on such unreported business receipts under section 271(1)(c) is hereby confirmed.

9. Regarding levy of penalty U/s 271A of the Act for non-maintenance of books of accounts, during the course of assessment proceedings, the Assessing Officer observed that the total receipt/turnover of the assessee business from both M/s Krishna Electronics and M/s Jharkhand Electric & Electronics, amounts to Rs.1,02,68,170/- as the assessee was having turnover exceeding Rs. 60 lacs during the year under consideration, accordingly, the provisions of Section 44AA of the Act are clearly applicable and the assessee was liable to maintain her books of account, which she had failed to do so. Accordingly, penalty amounting to Rs. 25,000/- was levied U/s 271A of the Act. The Id CIT(A) has confirmed the said levy of penalty stating that the provisions of Section 44AA are clearly applicable and the assessee has failed to maintain books of account without showing any reasonable cause.

10. Now the assessee is in appeal before the ITAT. While pleading on behalf of the assessee, the Id AR has reiterated the arguments as made before the Id. CIT(A) and prayed to delete the penalty. On the other hand, the Id DR has vehemently supported the orders of the authorities below.

11. We have heard the rival contentions of both the parties and perused the material available on the record. Undisputedly, the total receipt/turnover of the assessee business from both M/s Krishna Electronics and M/s Jharkhand Electric & Electronics, amounts to Rs.1,02,68,170/- and as the assessee was having turnover exceeding Rs. 60 lacs during the year under consideration, the provisions of Section 44AA of the Act are clearly applicable and the assessee was liable to maintain her books of account. Nothing has been brought on record which demonstrates any reasonable cause on part of the assessee in non-maintenance of her books of accounts. Therefore, we confirm the action of the AO in levying penalty under section 271A and the ground of appeal is hereby dismissed.

12. Now, coming to levy of penalty U/s 271B of the Act for not getting the books of account audited. The Assessing Officer observed that since the turnover of the assessee's business exceeds Rs. 60 lacs, the provisions of Section 44AB of the Act are clearly applicable and the assessee has failed to get her books of account audited. Accordingly, penalty @ 0.5% of total turnover amounting to Rs. 51,341/- was levied on the assessee.

13. Being aggrieved, the assessee carried the matter in appeal before the Id. CIT(A), who has since confirmed the said levy of penalty by following the decision of Coordinate Bench in the case of S.J. Agarwal & Co. Vs ITO (2008) 114 ITD 27 (Pune (SMC)).

14. Now the assessee is in appeal before us. During the course of hearing, the Id AR of the assessee has submitted that the assessee was under the bonafide belief that he is not required to obtain audit report only in respect of that business, the turnover of which crosses the limit of

the assessment year It was clarified by ICAI that tax audit as such is conducted in respect of an assessee and not in respect of particular business. The assessee having acted in bonafide belief and had no dishonest intention in not obtaining audit report for all the two businesses carried on by her, no penalty under section 271B to be imposed. Reliance was placed on the decision of ACIT & Anr Vs. Dr. K. Satish Shetty (2009) 310 ITR (Kar).

15. It was further submitted that the penalty u/s 27 IB cannot be levied if the assessee is not maintaining books of accounts which is very much clear that in case of Jharkhand Electric & Electronics, books were not maintained and the income so estimated by the Id. AO is on the basis of amount deposited in the bank account. In support, reliance was placed on the decision of Hon'ble Allahabad High Court in case of CIT Vs Bisauli Tractors (2008) 299 ITR 219 (All) and decision of Hon'ble Gauhati High Court in case of Rajmal Parsuram Todi (1996) 222 ITR 691 (Gau) whereas it was held that penalty u/s 27IB for failure to get accounts audited u/s 44AB is not attracted where books of accounts were not maintained by the assessee.

16. On the other hand, the Id DR has vehemently supported the orders of the authorities below.

17. We have heard the rival contentions and pursued the material available on record. It is an admitted position that the assessee has not maintained the books of accounts in respect of her business run in name and style of M/s Jharkhand Electric & Electronics, the turnover of which was determined at Rs 96.10 lacs. Basis the same, we have upheld the levy of penalty under section 271A for non-maintenance of books of

accounts. Once the penalty has been levied for non-maintenance of books of accounts, there cannot be penalty again for non-audit of books of accounts which were not kept at first place. It is clearly a case of impossibility of performance where it is expected that the assessee should get her books of accounts audited when it is a known and admitted fact that there are no regular books of accounts which have been maintained at first place. Our view is fortified by the decision of the Hon'ble Gauhati High Court in case of Rajmal Parsuram Todi (supra) wherein it was held that when a person commits an offence by not maintaining the books of accounts as contemplated under section 44AA, the offence is complete and after that, there can be no possibility of any offence as contemplated under section 44AB and therefore, the imposition of penalty under section 271A is erroneous. In the result, the levy of penalty under section 271B is hereby deleted.

18. In the result, appeal of the assessee in ITA No. 951/JP/2017 and ITA No. 952/JP/2017 are dismissed and appeal in ITA No. 953/JP/2017 is allowed.

Order pronounced in the open Court on 16/05/2018.

Sd/-  
(विजय पाल राव)  
(Vijay Pal Rao)  
न्यायिक सदस्य / Judicial Member

Sd/-  
(विक्रम सिंह यादव)  
(Vikram Singh Yadav)  
लेखा सदस्य / Accountant Member

जयपुर / Jaipur  
दिनांक / Dated:- 16<sup>th</sup> May, 2018

\*Ranjan

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Smt. Roshni Devi, Jaipur.
2. प्रत्यर्थी / The Respondent- The ITO, Ward-3(1), Jaipur.

3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त(अपील)/The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर/DR, ITAT, Jaipur
6. गार्ड फाईल/ Guard File (ITA No. 951 to 953/JP/2017)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar