

आयकर अपीलीय अधिकरण, कटक न्यायपीठ, कटक
IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK
BEFORE SHRI N.S.SAINI, AM & SHRI PAVAN KUMAR GADALE, JM

आयकर अपील सं./ITA No.324/CTK/2015
(निर्धारण वर्ष / Assessment Year :2010-2011)

JCIT, Range-1, Cuttack	Vs.	M/s Dushashan Jena, At.. Talashai, Jobra, Cuttack,
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAAFD 9502 C		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

AND

आयकर अपील सं./ITA No.244/CTK/2015
(निर्धारण वर्ष / Assessment Year :2010-2011)

ACIT, Range-1, Cuttack	Vs.	M/s Dushashan Jena, At.. Talashai, Jobra, Cuttack,
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAAFD 9502 C		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारिती की ओर से /Assessee by : None
राजस्व की ओर से /Revenue by : Shri D.K.Pradhan, CITDR
सुनवाई की तारीख / Date of Hearing : 02/08/2017
घोषणा की तारीख/Date of Pronouncement 03/08/2017

आदेश / O R D E R

Per Shri Pavan Kumar Gadale, JM:

These are the appeals filed by the revenue against the separate penalty orders passed by the CIT(A) for the assessment year 2010-2011.

2. The facts of both the appeals are same, therefore, for the sake of convenience, these appeals are clubbed together, heard and disposed off by this consolidated order. We first take up the facts narrated in ITA No.324/CTK/2015 in revenue appeal.

3. The revenue has filed an appeal against order of CIT(A) dated 23.04.2015, passed u/s.271D of the Act.

4. Brief facts of the case are that the assessee firm has received the loan from Shri Pratap Kumar Jena amounting to Rs.33,13,134/-. As Shri Pratap Kumar Jena is a partner and the amount was transferred from capital account as unsecured loan. But, the AO is of the opinion that the assessee has violated the provisions of Section 269SS of the Act and penalty u/s.271D of the Act is initiated. The AO issued penalty notice and there was no compliance to the notice, therefore, passed ex-parte order where the AO dealt on the provisions of Section 269SS and 271D of the Act and is of the opinion that the assessee has violated the provisions of Section 269SS by accepting the loan/deposits and penalty u/s.271D is levied.

5. Aggrieved by the penalty order of the AO, the assessee has filed an appeal before the CIT(A). In the appellate proceedings, the assessee has submitted that there is no element of cash transfer but the facts are that the partners capital account amount of Shri Pratap Ku. Jena was transferred to unsecured loan account of the firm which is accountable and there is no violation of provisions u/s.269SS and prayed for allowing the appeal. Ld. CIT(A) considered the facts, ground and submissions in the appellate proceedings and observed at para 3 of the order the amount has been transferred from partner's personal account to the unsecured loan account of the firm, and, therefore, the CIT(A) is of the opinion that no penalty can be levied u/s.271D of the Act and deleted the penalty and allowed the appeal of the assessee as observed at para 4 of the order as under :-

“4. I have carefully perused the penalty order passed u/s.271D of the Act by the JCIT, Range-1, Cuttack and the submissions made by the appellant. The JCIT has noted in the body of the penalty order that the amounts standing in the capital account of Sri Pratap Kumar Jena, partner of the firm was transferred to the firm as unsecured loan. From the facts and circumstances of the transfer, it indicates that there has been no advance/loan accepted in cash by the appellant firm from Sri Pratap Ku. Jena. Rather the transfer is within the accounts of the firm, from the capital account of Sri Jena to the loan account of the firm. I therefore direct the JCIT, Range-1, Cuttack to cancel the penalty.

6. Aggrieved with the order of CIT(A), the revenue has filed an appeal before the Tribunal. None appeared on behalf of the assessee when the matter was called for hearing. Accordingly, we proceed to dispose off the appeal on the basis of material available on record and the submissions of Id. DR.

7. Before us, Id. DR submitted that the Id. CIT(A) has erred in deleting the penalty as there is violation of Section 269SS of the Act and the unsecured loan transaction is not by account payee cheque and prayed for allowing the revenue's appeal.

8. We have heard the submissions of Id. DR and perused the material on record. Prima facie, on the facts of the case, we find the assessee firm has received unsecured loan from the retired partner and the transaction being transferred from capital account to unsecured loan account. Further the CIT(A) has dealt on the disputed issue in detail and considered the explanations of the assessee vis-à-vis the findings of the AO on the penalty proceedings and was of the opinion that amount standing in the capital account was transferred to the unsecured loan and there is no violation of Section 269SS of the Act deleted the penalty u/s.271D of the Act. Accordingly, we have no reason to interfere with the order of the

CIT(A) and are inclined to uphold the action of the CIT(A) in deleting the penalty and dismiss the grounds of appeal of the revenue. In the result, appeal of the revenue is dismissed.

9. Now, we shall take up ITA No.244/CTK/2015, where the revenue has raised the following grounds :-

01. Whether in the facts and circumstances of the case, the Ld. First Appellate Authority is justified in deleting the quantum of penalty of Rs.16,73,937/- imposed u/s.271(1)(c) on the ground that AO had disallowed various expenditure on estimation basis- when the AO has categorically noticed that expenses claimed by the assessee are not supported by bills and vouchers which were also not established before the appellate authority.

02. Whether in the facts and circumstances of the case, the Ld. First Appellate Authority is justified in deleting the quantum of penalty imposed u/s.271(1)(c) – when the AO specifically established that assessee had claimed various expenses of other concerns i.e. M/s. Baba Lingaraj Enterprises, Bhubaneswar in its P&L account which are not related to the assessee's firm in the previous year.

03. Whether in the facts and circumstances of the case, the Ld. First Appellate Authority is justified in deleting the quantum of penalty, when the assessee failed to appear or explain the case before the Assessing Officer in spite of opportunity of being heard was allowed to the assessee before passing the penalty order.

10. The AO while passing the assessment order u/s.143(3) of the Act has made disallowance of expenses on estimation at 35% on total expenses under various head as claimed by the assessee, subsequently the AO issued notice for levy of penalty u/s.271(1)(c) of the Act, the AO found there is no compliance of the said notice and there is concealment of income as no proper explanations were provided with regard to claim of expenses and finally the AO levied penalty u/s.271(1)(c) of the Act and passed order dated 27.9.2013.

11. Aggrieved by the penalty order of AO, the assessee filed an appeal before the CIT(A). The CIT(A) considered the facts and findings of the AO, and observed that the AO has disallowed 35% of expenditure claimed by the assessee on estimated basis without any specific reasons or specified expenditure, pertain to the any particular bill and vouchers. Therefore, Id. CIT(A) is of the opinion that the penalty under section 271(1)(c) of the Act cannot be sustained and deleted the penalty and allowed the appeal of the assessee and observed at page 2 of the order as under :-

'The appellant during appeal hearing submitted that the books of accounts were verified by the AO and assessment was completed u/s.143(3) of the Act. The disallowance of 35% of the expenditure claimed under various heads is adhoc in nature and the AO did not point out any specific lacunae in the expenditure claimed. Since the disallowance was mostly made on estimation, it cannot be taken that the appellant had shown inaccurate particulars of income.

I find substance in the contention of the appellant. The AO had disallowed 35% of the expenditure claimed by the assessee under various heads on estimation basis and did not specify which particular bills and vouchers were not maintained. Therefore, it is not tenable that penalty u/s.271(1)(c) of the Act be imposed for furnishing inaccurate particulars of income. .

12. Aggrieved by the order of CIT(A), the revenue has filed an appeal before the Tribunal.

13. None appeared on behalf of the assessee when the matter was called for hearing. Accordingly, we proceed to dispose off the appeal on the basis of material available on record and the submissions of Id. DR.

14. Ld. DR submitted that the CIT(A) was not justified in deleting the penalty on the ground that the expenditure has been disallowed on estimated basis due to non-availability of proper vouchers and bills.

Further, the AO has made an observation that there is no cooperation by the assessee in the penalty proceedings and prayed for restoration of the AO's order.

15. We have heard the submissions of Id. DR and perused the material on record. The sole ground being levy of penalty u/s.271(1)(c) of the Act. We found the AO has made assessment u/s.143(3) of the Act on 18.3.2013 assessing the total income of Rs.56,03,140/- by making additions of Rs.42,12,029/- being disallowing 35% of total expenses under the various heads claimed by the assessee due to non-availability of the bills and vouchers. We are of the opinion that when the assessment has been made on estimation basis and further the AO has not identified any specific bill/voucher for disallowance from the financial statements. Therefore, penalty u/s.271(1)(c) of the Act cannot be levied as per the ratio of Hon'ble Punjab & Haryana High Court in the case of Harigopal Singh, 258 ITR 85 (P&H), wherein it is held as under:-

"In order to attract clause (c) of section 271(1), it is necessary that there must be concealment by the assessee of the particulars of his income or if he furnishes inaccurate particulars of such income. In the instant case, the Tribunal agreed that the income of the assessee had to be assessed on an estimate of the turn over but was of the view that the estimate as made by the Assessing Officer was highly excessive and it fixed the total income of the assessee at a lower figure. It was, thus, clear that there was a difference of opinion as regards the estimate of the income of the assessee. Since the Assessing Officer and the Tribunal adopted different estimates in assessing the income of the assessee, it could not be said that the assessee had concealed the particulars of his income so as to attract clause (c) of section 271(1). There was not even an iota of evidence on the record to show that the income of the assessee during the year under appeal was more than the income returned by him. Additions in his income were made, on estimate basis and that by itself did not lead to the conclusion that the assessee either concealed the particulars of his income or furnished inaccurate particulars of such income. There had to be a

positive act of concealment on his part and the onus to prove that was on the department. Further, the Tribunal grossly erred in law in relying on Explanation 1(B) to section 271(1)(c) to raise a presumption against the assessee. The assessee had justified his estimate of income on the basis of household expenditure and other investments made during the relevant period. It was not the case of the revenue that he had in fact incurred expenditure in excess of what he had stated. Therefore, it could not be said that the explanation furnished by the assessee had not been substantiated or that he had failed to prove that such explanation was not bona fide.

In the result, the appeal was allowed.”

We find the CIT(A) has passed a reasoned order in deleting the penalty and we are not inclined to interfere with the order of CIT(A) and upheld the same. Accordingly, the grounds of appeal of the revenue are dismissed.

16 . In the result, both appeals of the revenue are dismissed.

Order pronounced in the open court on this 03/08/2017.

Sd/-

(N. S. SAINI)

लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-

(PAVAN KUMAR GADALE)

न्यायिक सदस्य / JUDICIAL MEMBER

कटक Cuttack; दिनांक Dated 03/08/2017

प्र. कु. मि / PKM, Senior Private Secretary

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

1. अपीलार्थी / The Appellant-
JCIT, Range-1, Cuttack
2. प्रत्यर्थी / The Respondent-
M/s Dushashan Jena,
At.. Talashai, Jobra, Cuttack
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कटक / DR, ITAT, Cuttack
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

(Senior Private Secretary)

आयकर अपीलीय अधिकरण, कटक / ITAT, Cuttack