

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'A' NEW DELHI**

**BEFORE
SHRI G.D. AGRAWAL, VICE PRESIDENT
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No. 4103/Del/2015
Assessment Year: 2006-07**

**ITA No. 4104/Del/2015
Assessment Year: 2009-10**

**Shri Vivek Jairath,
C/o Matta & Associates,
877, Aggarwal Cyber Plaza-II,
Netaji Subhash Place,
Pitampura, Delhi-110034
(PAN: ADNPJ0779P)
(Appellant)**

vs

**DCIT,
Circle-2,
Ghaziabad.**

(Respondent)

**Department by: Shri Ajay Kumar Matta, CA
Assessee by: Shri B.S. Anant, Sr. DR**

**Date of hearing: 4.10.2018
Date of pronouncement : 27.12.2018**

ORDER

PER BENCH:

ITA No. 4103/Del/2015 is the assessee's appeal against the order dated 19.02.2015 passed by the Ld. CIT (Appeals), Muzaffarnagar for assessment year 2006-07 wherein, vide the impugned order, the Ld. CIT (Appeals) has partly confirmed the penalty imposed u/s 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"). ITA No. 4104/Del/2015 is

the assessee's appeal for assessment year 2009-10 and is preferred against the order dated 11.03.2015 passed by Ld. CIT (Appeals), Ghaziabad. Both these appeals were heard together and for the sake of convenience, they are being disposed of through this common order.

2.0 Brief facts of the case are that for assessment year 2006-07, the return of income was filed declaring income of Rs. 14,63,340/- and the turnover declared by the assessee was Rs. 4,79,88,247/-. The assessee is engaged in the business of construction work and, therefore, the Assessing Officer proceeded to assess the net profit @8% of the turnover, thereby computing the profit at Rs. 38,39,060/-. On appeal, the Ld. CIT (Appeals) directed the Assessing Officer (AO) to compute the net profit by applying the rate of 6.75%, thus partly allowing the assessee's appeal. Subsequently, penalty u/s 271(1)(c) of the Act was imposed on the differential amount of the net profit as declared by the assessee and the net profit as directed to be computed by the Ld. CIT (Appeals). The penalty imposed was Rs. 17 lakh on the alleged suppression of income to the tune of Rs. 17,17,100/-. On appeal, the Ld. CIT (Appeals) reduced this penalty to Rs. 5,95,815/- being penalty @100% on the tax allegedly sought to

be evaded by the assessee. Now, the assessee is in appeal before the ITAT against the upholding of penalty by the Ld. CIT (Appeals).

2.1 In assessment year 2009-10, the return of income was filed declaring income of Rs. 39,70,085/- and the turnover declared by the assessee was Rs. 7,93,68,845/-. The assessment was completed u/s 144 of the Act by adopting net profit rate of 8% and the resultant profit was computed at Rs. 6,349,508/-, thus making an addition of Rs. 22,93,408/-. The assessee's appeal against the assessment was dismissed by the Ld. CIT (Appeals) and the assessee is now in appeal before the ITAT against the dismissal of his appeal in ITA No. 4104/Del/2015.

3.0 Arguing against the upholding of penalty, the Ld. AR submitted that the penalty had been imposed on addition based on estimation of profit without bringing on record any defect in the method of accounting followed by the assessee. It was submitted that no penalty u/s 271(1)(c) is imposable in case where the net profit is estimated.

4.0 In response, the Ld. Sr. DR placed reliance on the concurrent findings of both the lower authorities and also drew

attention to the fact that the books of accounts had been rejected by the Assessing Officer and, therefore, the penalty had been rightly imposed.

5.0 With respect to assessee's appeal for assessment year 2009-10, the Ld. AR assailed the order of the Assessing Officer by submitting that the net profit of 8% had been arbitrarily applied by the Assessing Officer. He also drew our attention to a chart, which was placed on page 40 of the paper book, depicting the percentage of assessed profits in preceding assessment years by the Assessing Officer and submitted that never earlier had the net profit been computed @ 8% of the turnover. It was submitted that it was in assessment year 2006-07 only that the assessment had been made @8% which had been reduced to 6.75% by the Ld. CIT (Appeals) and against which no further appeal had been preferred by the assessee but apart from this, the net profit percentage ranged from 1.84% to 7.5% only. It was submitted that the results declared by the assessee be directed to be accepted.

6.0 In response, the Ld. Sr. DR placed reliance on the concurrent findings of both the lower authorities and submitted that the addition had been rightly made.

7.0 We have heard the rival submissions and perused the material available on record. As far as the issue of penalty in ITA 4103/Del/2015 is concerned, it is undisputed that the penalty was imposed on estimated profit enhancement. The assessee has also filed a chart depicting the net profit percentages during the immediately four preceding assessment years wherein it is seen that the net profit assessed was 1.84% for assessment year 2002-03, 3.3% for assessment year 2003-04, 2.71% for assessment year 2004-05 and 5% for assessment year 2005-06. Although, in the captioned year, the assessee did not prefer further appeal after the Ld. CIT (Appeals) reduced the net profit estimation rate from 8% to 6.75%, the fact remains that this is an estimate of profit and the Ld. CIT (Appeals), while allowing partial relief by directing application of net profit rate of 6.75%, has not given any cogent reason for arriving at this percentage. Thus, the net profit rate, as directed to be applied by the Ld. CIT (Appeals), is just an estimate without having any sound basis as the past financial results of the assessee have not been duly considered. It is settled law that penalty for furnishing inaccurate particulars of income can neither be imposed nor sustained on enhancement of net profit rate based on an estimate. The Hon'ble Delhi High

Court in [CIT vs. Aero Traders Pvt. Ltd.](#), (2010) 322 ITR 316 (Del), has held that no penalty u/s 271(1)(c) can be imposed when income is determined on estimate basis. Similar view has been taken by the Hon'ble Punjab & Haryana High Court in [Harigopal Singh vs. CIT](#) (2002) 258 ITR 85 (P&H) and the Hon'ble Gujarat High Court in [CIT vs. Subhash Trading Company](#), 221 ITR 110 (Guj). Accordingly, we are of the considered opinion that no penalty is imposable on the facts of the present case. We set aside the order of the Ld. CIT (Appeals) and direct the Assessing Officer to delete the penalty.

7.1 In the result ITA 4103/Del/2015 stands allowed.

8.0 We now take up the assessee's appeal for assessment year 2009-10 bearing ITA 4104/Del/2015 wherein the assessee has challenged the application of rate of 8% for computing net profit by the Assessing Officer which has been further confirmed by the Ld. CIT (Appeals). Here also, we find that right from assessment year 2002-03 to the year under consideration, the net profit rate has ranged between 1.84% to 6.75%. A perusal of the assessment order also shows that the books of accounts were rejected before applying the net profit rate of 8%. However, the Assessing Officer has not given any reason for justifying the

rejection of books of accounts except for mentioning that the books of accounts could not be held reliable on account of a large number of self-generated cash vouchers. Thus, in our considered opinion, this cannot be held to be a justifiable reason for rejecting the books of accounts. On a direct query from the Bench, both the parties have also agreed that interest of justice would be met if the net profit rate of 6% is directed to be applied in this year. Accordingly, we modify the order of the Ld. CIT (Appeals) to the extent that now the Assessing Officer shall compute the net profit by applying net profit rate of 6% as against 8%.

8.1 Thus, ITA 4104/Del/2015 stands partly allowed.

9.0 In the result, ITA 4103/Del/2015 stands allowed and ITA 4104/Del/2015 stands partly allowed.

Order pronounced in the open court on 27/12/2018.

Sd/-

**(G.D. AGRAWAL)
VICE PRESIDENT**

Sd/-

**(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER**

Dated: 27th DECEMBER, 2018
'GS'

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

By Order

ASSTT. REGISTRAR