

आयकर अपीलीय अधिकरण "ए" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE

श्री डी. करुणाकरा राव, लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No.1727/PUN/2016
निर्धारण वर्ष / Assessment Year : 2007-08

M/s. Babubhai Cloth Store,
Babubhai Villa,
Kulkarni Colony,
Sharanpur Road,
Nashik - 422 002
PAN : AADFB4642E

.....अपीलार्थी/ Appellant

Vs.

Addl.CIT, Range-1,
Nashik

.....प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by : None
प्रत्यर्थी की ओर से / Respondent by : Shri Sanjeev Ghei

सुनवाई की तारीख / Date of Hearing : 29.01.2019	घोषणा की तारीख / Date of Pronouncement: 30.01.2019
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आदेश / ORDER

PER D. KARUNAKARA RAO, AM :

This appeal is filed by the Assessee against the order of CIT(A)-1, Nashik, dated 09-06-2016 for the Assessment Year 2007-08.

2. Briefly stated, relevant facts include, that the assessee is a firm engaged in the business of supply of cloth to Security Press, Nashik for binding cloth, gold foil, ultra violet thread etc. During the year under consideration, the assessee filed return of income computing taxable fringe benefit of Rs.1,11,404/-. In the assessment, AO noticed that assessee claimed various expenses viz. (1) Sales Promotion Expenses; (2) Hospitality; (3) Employees Welfare; (4) Repairs running maintenance of motors cars; (5)

Telephone/Mobile bills; and (6) Tours and Travels and the taxation of Fringe Benefit Tax was the issue. In the assessment u/s.115WE(3) of the Income-tax Act, 1961, the AO made certain additions on the above claims of the assessee and worked out the Fringe Benefit at Rs.4,27,070/-. Further, invoking the provisions of section 271(1)(d) of the Act, the AO levied penalty of Rs.1,05,859/- in the hands of the assessee.

3. Aggrieved with the findings of AO, the assessee filed an appeal before the First Appellate Authority. The assessee remained unsuccessful before the First Appellate Authority too for want of prosecution. Now the assessee has approached the Tribunal by raising following grounds :

“1. The appeal pertains to the penalty u/s. 271(1)(d) for the additions made on account of FBT u/s. 115WE (3) of the I.T. Act.

2. On the facts and in circumstances of the case and in law the Hon. AO as well as CIT Appeal-I had erred and levied and dismissed the penalty appeal of the appellant respectively. In spite, of the fact, that the quantum appeal had been contested by the appellant.

3. On the facts and in circumstances of the case and in law the Hon. AO as well as CIT Appeal-I had erred and levied and dismissed the penalty appeal of the appellant respectively, on the addition on account in FBT u/s. 115WE (3) of the I.T. Act which was based entirely on the expenses made & incurred by the partners of the firm for the business purpose.

4. On the facts and in circumstances of the case and in law the Hon. AO as well as CIT Appeal-I had erred and ignored the principal facts of levy of FBT & subsequently penalty on it, which is particularly based on the employer, employee relation & expenditure made thereon, and the penalty was levied on the addition of expenditure which were incurred by the partners who are the real owners of the business and there is no kind of employer, employee relation between the firm and partner.

5. On the facts and in circumstances of the case and in law the Hon. CIT Appeal-I had erred and dismissed the penalty appeal for non-attendance ignoring the fact that the appellant had responded and made partial submission at least 8 times in writing before the authority and which has been mentioned in the dismissal order.

6. *On the facts and in circumstances of the case and in law the Hon. AO as well as CIT Appeal-1 had erred and levied and dismissed the appeal without considering the fact that in the judicial court of law a lenient view had been taken in favour of the appellant under similar circumstances.*

7. *Prayer : The Hon. Appellate Authority is sincerely requested –*

- a. The appeal may please be allowed.*
- b. The penalty may please be waived*
- c. The appellant may please be given a chance of personal hearing.*
- d. The appellant may please be allowed to submit his contention before or during the hearing of the appeal.*
- e. Any other relief may please be allowed as the appellate authority may deem it.*

8. *The appellant craves leave to add, alter, amend or withdraw any of the grounds of appeal.”*

4. Before us, there is none to represent the case of the assessee despite service of notice. However, considering the factual matrix of the case, and the orders of the Revenue and the availability of assistance of the Ld. DR, we proceed to adjudicate the case.

5. Ld. DR for the Revenue vehemently defended the order confirming levy of penalty. Further, ld. DR submitted that penalty u/s.271(1)(d) of the Act was levied on the assessee for furnishing of inaccurate particulars of income. Ld. DR submitted that, while levying penalty u/s.271(1)(c), the Assessing Officer has categorically mentioned that the penalty is being levied for filing of inaccurate particulars of income. There is no ambiguity or vagueness in the mind of Assessing Officer while levy of penalty.

6. We have heard the Ld. DR and perused the orders of the authorities below. On careful circumspection of the assessment and penalty orders, we find that this is a case where the AO failed to record proper satisfaction while initiating the penalty proceedings and levying the penalty. We proceed to adjudicate the issue relating to recording of proper satisfaction by the

AO. In this connection, we perused the assessment order dated 18-12-2009 and find the satisfaction recorded by the AO for initiating the penalty proceedings u/s.271(1)(c) of the Act is relevant for extraction. Therefore, the same is reproduced as under :

“4.....
.....

Penalty proceedings u/s.271(1)(d) are being initiated separately.”

6.1 We also perused the penalty order dated 28-03-2013 and find the satisfaction recorded by the AO for levying the penalty u/s.271(1)(c) of the Act is relevant for extraction. The said satisfaction reads as under:

“5.
..... *In view of the above facts and circumstances of the case and in law, I am of the considered opinion that this is a **fit case for levy of penalty in terms of Explanation 1 to Section 271(1)(d) of the IT Act, 1961, for filing of inaccurate particulars of Fringe Benefit Tax.***”

From the above, it is evident that at the time of initiation of penalty proceedings in the assessment, AO has not mentioned any limb. However, at the time of levy of penalty, the AO mentioned that **“this is a fit case for levy of penalty in terms of Explanation 1 to Section 271(1)(d) of the IT Act, 1961, for filing of inaccurate particulars.** This manner of recording of satisfaction suggests the existence of ambiguity with reference to applicability of specific limb. It is a settled legal proposition that the AO is under obligation to specify the correct limb at the time of initiation as well as at the time of levy of penalty. This view of ours is fortified by the judgment in the case CIT Vs. Shri Samson Perinchery (2017) 392 ITR 4 (Bom.) as well as the judgment of Hon’ble Karnataka High Court in the case of CIT Vs. Manjunatha Cotton and Ginning Factory 359 ITR 565. In view of the above deliberation on this issue, without going into the merits of the

penalty, we are of the opinion that the penalty order is liable to be quashed on this legal issue. Thus, the order of CIT(A) is set-aside and direct the AO to delete the penalty on technical grounds. In view of this decision, the adjudication of grounds on merits becomes an academic exercise only. Hence, they are dismissed as such.

7. In the result, appeal of the assessee is allowed on technicalities.

Order pronounced on this 30th day of January, 2019.

Sd/-

Sd/-

(विकास अवस्थी /VIKAS AWASTHY)
न्यायिक सदस्य/JUDICIAL MEMBER

(डी. करुणाकरा राव/D. KARUNAKARA RAO)
लेखा सदस्य/ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 30th January, 2019
Satish

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-1, Nashik
4. आयकर आयुक्त / The Pr.CIT-1, Nashik
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "ए" / DR 'A', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune.