

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "H" MUMBAI**

**BEFORE SHRI RAVISH SOOD (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 5818/MUM/2018
Assessment Year: 2005-06**

Harsha Pravin Shah,
C-201, Shambhavnath Building,
Near Hain Temple, Virar (W),
Thane, Maharashtra.

The Income Tax Officer,
Vs. Ward-4(2), Thane

PAN No. AADPS8397R
Appellant

Respondent

Assessee by : Shri N. M. Porwal, AR
Revenue by : Shri K. Bhoopathi, DR

Date of Hearing : 13/11/2019
Date of pronouncement : 15/11/2019

ORDER

PER N.K. PRADHAN, AM

This is an appeal filed by the assessee. The relevant assessment year is 2005-06. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-3, Mumbai [in short 'CIT(A)'] and arises out of penalty levied u/s. 271(1)(c) of the Income Tax Act 1961, (the 'Act'). There has been a delay of 14 days on the part of the assessee in filing the appeal before the Tribunal. Having gone through the affidavit filed by the assessee stating that her husband was critically ill during the relevant period, we are convinced that the assessee had genuine difficulty in filing this appeal. Therefore, we condone the delay of 14 days' on the part of the assessee in filing the present appeal.

2. The grounds raised by the assessee read as under:

1. On the facts and in the circumstances of the case, the Ld. CIT(A)-3 erred in levying penalty u/s. 271(1)(c) of the Income Tax Act, 1961 at Rs.1,18,777/-.
2. The Ld. CIT(A) erred in not appreciating that the omission of Assessing Officer to explicitly mention that penalty proceedings are being initiated for furnishing of inaccurate particulars or that for concealment of income makes the penalty order liable for cancellation.
3. The Ld. CIT(A) erred in not appreciating that the penalty order passed by the AO is barred by limitation.

3. Briefly stated, the facts of the case are that the assessment u/s.143(3) r.w.s 254 was passed by the Assessing Officer (AO) on 20.03.2013 determining total income at Rs.2,21,240/-. The AO found that as per AIR information u/s.285BA, the assessee had cash deposits to the tune of Rs.27,68,032/-. As there was no compliance by the assessee, the AO added back the above amount of Rs.27,68,032/-. Against the above assessment order, the assessee filed an appeal before CIT(A) who rejected the appeal. Against the said order of the CIT(A), the assessee filed an appeal before Tribunal. We find that the Tribunal vide order dated 18.02.2011 directed the AO to make the assessment afresh. During the course of set-aside assessment proceedings, the assessee admitted before the AO that she did not maintain books of accounts and claim that the profit margin is only 1% to 1.5% of the turnover. The AO estimated the profit @8% of Rs.27,68,032/- which comes to Rs.2,21,440/- . Thereafter, the AO levied a penalty of Rs.1,18,777/- u/s. 271(1)(c) of the Act.

4. In appeal, the ld. CIT(A) dismissed the appeal filed by the assessee on the ground that (i) cash deposit of Rs.27,68,032/- is the unaccounted

income /deposit of the assessee, because the cash deposit has not been declared in the return of income as the appellant has not filed the original return of income as required by the Act, (ii) the intention of appellant is a deliberate attempt to evade tax because in this case had not been taken up for scrutiny, the assessee would have evaded tax to the extent of income assessed by the AO and (iii) the assessee has not filed appeal against the assessment order, which shows that the income was correctly assessed from the unaccounted deposits/income.

5. Before us, the ld. counsel for the assessee submits that the appellant had offered a net profit of 4 to 5% on total turnover of Rs.27,68,032/-, which thereafter was estimated by the AO at flat rate of 8% which works out to Rs.2,21,442/-. It is explained that though the assessee had earned income to be extent of 1% to 1.5%, she had offered for taxation in the range of 4 to 5% before the AO. Subsequently, the AO increased the estimation to a flat rate of 8% purely on estimation basis. In this regard, relying on the judgment of the Hon'ble Madras High Court in CIT v. Smt. K. Meenakshi Kutty 258 ITR 494 (Mad.), the ld. counsel submits that in a case where the income has been arrived at on estimate and the same is higher than the one disclosed by the assessee, penalty can be levied u/s. 271(1)(c) of the Act.

6. On the other hand, the ld. Departmental Representative (DR) submits that the cash deposits of Rs.27,68,032/- is the unaccounted income/deposit of the assessee and as it has not been disclose in the return of income, the AO has rightly levied a penalty of Rs.1,18,777/- u/s.271(1)(c) of the Act.

7. We have heard the rival submissions and perused the relevant materials available on record. As mentioned earlier, the AO determined income u/s.143(3) r.w.s 254 at Rs.2,21,240/-. As per the AIR information, the assessee had cash deposits of Rs.27,68,032/-. The appeal filed by the assessee against the above order of the AO was dismissed by the CIT(A). In further appeal, the Tribunal directed the AO to make an order afresh. During the course of set-aside assessment proceedings, the assessee admitted that she did not maintain books of accounts and claim that the profit margin is only 1% to 1.5% of the turnover. As the profit could not be quantified due to non-maintenance of books of accounts, the AO estimated the profit @8% which works out to Rs.2,21,440/-. Finally the AO levied a penalty of Rs.1,18,777/- u/s.271(1)(c) of the Act.

It is well-settled that penalty proceedings are independent and separate. In *Jain Bros v. Union of India*, (1970) 77 ITR 107, 116 (SC), it is held by the Hon'ble Supreme Court that although penalty has been regarded as an additional tax in certain sense and for certain purposes, it is not possible to hold that penalty proceedings are essentially a continuation of the proceedings relating to assessment where a return has been filed.

In the instant case, the AO has summarily followed the assessment order and levied penalty u/s. 271(1)(c) forgetting that penalty proceedings are independent and separate. All the more, the profit arrived at by the AO in the assessment order is on estimation. Therefore, we delete the penalty of Rs.1,18,777/- levied by the AO.

8. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open Court on 15.11.2019

Sd/-
(RAVISH SOOD)
JUDICIAL MEMBER

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;
Dated: 15/11/2019
Subhankar, PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,
(Dy./Assistant Registrar)
ITAT, Mumbai