

## IN THE INCOME TAX APPELLATE TRIBUNAL

"B" BENCH : BANGALORE

BEFORESHRI ARUN KUMAR GARODIA, ACCOUNTANT MEMBER AND

SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA No. 404 to 416/Bang/2019
Assessment Years : 2009 – 10 to 2014 – 15

Shri Harshvardhan, No. 168/B, Ground Floor, 6 <sup>th</sup> B Cross, 1 <sup>st</sup> N Block, Near Sagar Fast Food, Rajajinagar, Bangalore - 560010 <b>PAN: AJHPM1729J</b>		vs.	DCIT, Central Circle – 1 (4), Bangalore
APPELLANT			RESPONDENT
Assessee by	:	Shri C. Ramesh, C. A.	
Revenue by	:	Shri Manjeet Singh, Addl. CIT (DR)	
Date of hearing	:	19.12.2019	
Date of Pronouncement	:	29.01.2020	

**ORDER**

Per Bench:

This bunch of 13 appeals is filed by the assessee. It includes Six Appeals in respect of Penalty imposed by the AO u/s 271B of I T Act, 1961 for Assessment years 2009 – 10 to 2014 – 15. Similarly, there are Six Appeals in respect of Penalty imposed by the AO u/s 271 (1) (c) of I T Act, 1961 for same six Assessment years 2009 – 10 to 2014 – 15. Remaining one appeal is for

Assessment year 2013 – 14 in respect of Penalty imposed by the AO u/s 271 AAB of I T Act, 1961. All these appeals were heard together and are being disposed of by way of this common order for the sake of convenience.

2. First, we take up and decide Six Appeals in respect of Penalty imposed by the AO u/s 271B of I T Act, 1961. This penalty was imposed for this reason that the assessee did not furnish Tax Audit Report for these years as required u/s 44AB of I T Act, 1961. The amount of Penalty is Rs. 42,500/- in A. Y. 2009 – 10, Rs. 30,000/- in A. Y. 2010 – 11, Rs. 150,000/- in A. Y. 2011 – 12, Rs. 150,000/- in A. Y. 2012 – 13, Rs. 72,225/- in A. Y. 2013 – 14 and 82,550/- in A. Y. 2014 – 15.

3. It was submitted by the learned AR of the assessee that the assessee is a Civil Contractor following Project Completion Method and because of search and at the instance of the search party, the assessee accepted to recognise the revenue on partial completion and accordingly, the turnover was recognised and return was filed. As per Project Completion method, there was no turnover in any of these years as was being followed by the assessee. It was also submitted that there is no books and accounts prescribed under Rule 6F (1) for Civil Contractor and because of these facts, in these years, the assessee was not required as per law to maintain any books of accounts and in the absence of books of accounts, there cannot be tax audit requirement u/s 44AB. He placed reliance on the tribunal order rendered in the case of K. V. Ramachandran vs. DCIT in ITA No.

104/Coch/2013 dated 26.07.2013 and submitted a copy of this tribunal order. He pointed out that in that case also, the assessee was a civil contractor and the tribunal gave a finding that CBDT did not prescribe the list of books of accounts to be maintained by a civil contractor. He also pointed out that the tribunal in that case followed another tribunal order rendered in the case of the same assessee for the preceding year in which the tribunal followed several other tribunal orders rendered by Chandigarh Bench of the tribunal in the case of Aggarwal Construction Co. etc. The tribunal also followed a Judgment of Hon'ble Karnataka High Court rendered in the case of CIT vs. Babu Reddy as reported in 38 DTR 147 in which it was held that since no format of books of accounts were prescribed under the Rules for Civil Contracts, Penalty u/s 271A is not justified. He submitted that when no penalty u/s 271A is leviable, Penalty u/s 271B also cannot be levied for non-audit as prescribed u/s 44AB. Learned DR of the revenue supported the orders of the lower authorities.

4. We have considered the rival submissions. We find that the tribunal order cited by the learned of learned AR of the assessee and the Judgment of Hon'ble Karnataka High Court rendered in the case of CIT vs. Babu Reddy (Supra) are squarely applicable in the present case because learned DR of the revenue could not point out any difference in facts. Therefore, respectfully following the same, we delete the penalty u/s 271B in all these six years.

5. Now, we take up and decide Six Appeals in respect of Penalty imposed by the AO u/s 271 (1) (c) of I T Act, 1961. In these appeals, although several grounds are raised on technical aspects as well as on merit but in course of hearing, learned AR of the assessee mainly argued on this aspect that the penalty orders are bad in law because no specific allegation is made in the penalty notices issued u/s 274 r.w.s. 271 as to whether the charge is about concealment of income or furnishing of inaccurate particulars of income. He filed a copy of the notice for each of these six years. Reliance was placed on the Judgment of Hon'ble Karnataka High Court rendered in the case of CIT vs. Manjunath Cotton & Ginning Factory, 359 ITR 565. Learned DR of the revenue supported the orders of the lower authorities.

6. We have considered the rival submissions. We find that the Judgment of Hon'ble Karnataka High Court rendered in the case of CIT vs. Manjunath Cotton & Ginning Factory (Supra) is squarely applicable in the present case because learned DR of the revenue could not point out any difference in facts. We find that in each of the notices issued by the AO under section 274, the AO is alleging that the assessee has concealed the particulars of his income or has furnished inaccurate particulars of such income. Hence it is seen that the allegation is vague. Para 63 of this judgment is relevant because it contains the conclusion and hence, we reproduce it as under:-

**“CONCLUSION**

**63. In the light of what is stated above, what emerges is as under:**

- a) Penalty under Section 271(1)(c) is a civil liability.**
- b) Mens rea is not an essential element for imposing penalty for breach of civil obligations or liabilities.**
- c) Willful concealment is not an essential ingredient for attracting civil liability.**
- d) Existence of conditions stipulated in Section 271(1)(c) is a sine qua non for initiation of penalty proceedings under Section 271.**
- e) The existence of such conditions should be discernible from the Assessment Order or order of the Appellate Authority or Revisional Authority.**
- f) Ever if there is no specific finding regarding the existence of the conditions mentioned in Section 271(1)(c), at least the facts set out in Explanation 1(A) & (B) it should be discernible from the said order which would by a legal fiction constitute concealment because of deeming provision.**
- g) Even if these conditions do not exist in the assessment order passed, at least, a direction to initiate proceedings under Section 271(1)(c) is a sine qua non for the Assessment Officer to initiate the proceedings because of the deeming provision contained in Section 1(B).**
- h) The said deeming provisions are not applicable to the orders passed by the Commissioner of Appeals and the Commissioner.**
- i) The imposition of penalty is not automatic.**
- j) Imposition of penalty even if the tax liability is admitted is not automatic.**
- k) Even if the assessee has not challenged the order of assessment levying tax and interest and has paid tax and interest that by itself would not be sufficient for the authorities either to initiate penalty proceedings or impose penalty, unless it is discernible from the assessment order that, it is on account of such unearthing or enquiry concluded by authorities it has resulted in payment of such tax or such tax liability came to be admitted and if not it would have escaped from tax net and as opined by the assessing officer in the assessment order.**
- 1) Only when no explanation is offered or the explanation offered is found to be false or when the assessee fails to prove that the explanation offered is not bonafide, an order imposing penalty could be passed.**
- m) If the explanation offered, even though not substantiated by the assessee, but is found to be bonafide and all facts relating to the same and material to the computation of his total income have been disclosed by him, no penalty could be imposed.**
- n) The direction referred to in Explanation IB to Section 271 of the Act should be clear and without any ambiguity.**
- o) If the Assessing Officer has not recorded any satisfaction or has not issued any direction to initiate penalty proceedings, in appeal, if the appellate authority records satisfaction, then the penalty proceedings have to be initiated by the appellate authority and not the Assessing Authority.**

**p) Notice under Section 274 of the Act should specifically state the grounds mentioned in Section 271(1)(c), i.e., whether it is for concealment of income or for furnishing of incorrect particulars of income**

**q) Sending printed form where all the ground mentioned in Section 271 are mentioned would not satisfy requirement of law.**

**r) The assessee should know the grounds which he has to meet specifically. Otherwise, principles of natural justice is offended. On the basis of such proceedings, no penalty could be imposed to the assessee.**

**s) Taking up of penalty proceedings on one limb and finding the assessee guilty of another limb is bad in law.**

**t) The penalty proceedings are distinct from the assessment proceedings. The proceedings for imposition of penalty though emanate from proceedings of assessment, it is independent and separate aspect of the proceedings.**

**u) The findings recorded in the assessment proceedings in so far as "concealment of income" and "furnishing of incorrect particulars" would not operate as res judicata in the penalty proceedings. It is open to the assessee to contest the said proceedings on merits. However, the validity of the assessment or reassessment in pursuance of which penalty is levied, cannot be the subject matter of penalty proceedings.**

**The assessment or reassessment cannot be declared as invalid in the penalty proceedings.**

7. Clause p) of this Para reproduced above specifically states that Notice u/s 274 of I T Act should specifically state the grounds mentioned in section 271 (1) (c ) i.e. whether it is for concealment of income or for furnishing of inaccurate particulars of income and clause q) specifically states that Sending printed form where all the ground mentioned in Section 271 are mentioned would not satisfy requirement of law. Clause r) specifically states that the assessee should know the grounds which he has to meet specifically. Otherwise, principles of natural justice is offended. On the basis of such proceedings, no penalty could be imposed to the assessee. Therefore, respectfully following this judgment, we delete the penalty u/s 271(1) (c) also in all these six years.

8. Now, we take up and decide the remaining one Appeal in respect of Penalty imposed by the AO u/s 271 AAB of I T Act, 1961. In this appeal, the grievance of the assessee is about penalty imposed by the AO of Rs. 584,640/- u/s 271AAB of I T Act for A. Y. 2013 – 14. Both sides were heard. First, we reproduce the provisions of Section 271 AAB of I T Act for ready reference. The same are as under:-

**“(1) The Assessing Officer may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under section 132 on or after the 1<sup>st</sup> day of July, 2012 but before the date on which the Taxation Laws (Second Amendment) Bill, 2016 receives the assent of the President, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him,—**

**(a) a sum computed at the rate of ten per cent. of the undisclosed income of the specified previous year, if such assessee—**

**(i) in the course of the search, in a statement under sub-section (4) of section 132, admits the undisclosed income and specifies the manner in which such income has been derived;**

**(ii) substantiates the manner in which the undisclosed income was derived; and**

**(iii) on or before the specified date—**

**(A) pays the tax, together with interest, if any, in respect of the undisclosed income; and**

**(B) furnishes the return of income for the specified previous year declaring such undisclosed income therein;**

**(b) a sum computed at the rate of twenty per cent. of the undisclosed income of the specified previous year, if such assessee—**

**(i) in the course of the search, in a statement under sub-section (4) of section 132, does not admit the undisclosed income; and**

**(ii) on or before the specified date—**

**(A) declares such income in the return of income furnished for the specified previous year; and**

**(B) pays the tax, together with interest, if any, in respect of the undisclosed income;**

**(c) a sum computed at the rate of sixty per cent of the undisclosed income of the specified previous year, if it is not covered by the provisions of clauses (a) and (b).**

**(1A) The Assessing Officer may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under section 132 on or after the date on which the Taxation Laws (Second Amendment) Bill, 2016 receives the assent of the President, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him,—**

**(a) a sum computed at the rate of thirty per cent. of the undisclosed income of the specified previous year, if the assessee—**

**(i) in the course of the search, in a statement under sub-section (4) of section 132, admits the undisclosed income and specifies the manner in which such income has been derived;**

**(ii) substantiates the manner in which the undisclosed income was derived; and**

**(iii) on or before the specified date—**

**(A) pays the tax, together with interest, if any, in respect of the undisclosed income; and**

**(B) furnishes the return of income for the specified previous year declaring such undisclosed income therein;**

**(b) a sum computed at the rate of sixty per cent. of the undisclosed income of the specified previous year, if it is not covered under the provisions of clause (a).]**

**(2) No penalty under the provisions of section 270A or clause (c) of sub-section (1) of section 271 shall be imposed upon the assessee in respect of the undisclosed income referred to in sub-section (1) or sub-section (1A).**

**(3) The provisions of sections 274 and 275 shall, as far as may be, apply in relation to the penalty referred to in this section.**

**Explanation.— For the purposes of this section,—**

**(a) “specified date means the due date of furnishing of return of income under sub-section (1) of section 139 or the date on which the period specified in the notice issued under section**

**153A for furnishing of return of income expires, as the case may be;**

**(b) “specified previous year means the previous year—**

**(i) which has ended before the date of search, but the date of furnishing the return of income under sub-section (1) of section 139 for such year has not expired before the date of search and the assessee has not furnished the return of income for the previous year before the date of search; or**

**(ii) in which search was conducted;**

**(c) “undisclosed income means—**

**(i) any income of the specified previous year represented, either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions found in the course of a search under section 132, which has—**

**(A) not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating to such previous year; or**

**(B) otherwise not been disclosed to the <sup>5752</sup>[Principal Chief Commissioner, Chief Commissioner or Principal Commissioner or Commissioner] before the date of search; or**

**(ii) any income of the specified previous year represented, either wholly or partly, by any entry in respect of an expense recorded in the books of account or other documents maintained in the normal course relating to the specified previous year which is found to be false and would not have been found to be so had the search not been conducted.”**

9. As per Para 9.2 of the Penalty order, it is stated by the AO that the case of the assessee falls under clause (a) of sub section (1) of section 271AAB of I T Act. As per the provisions of this clause as reproduced above, this is the pre-condition that such assessee in the course of the search, in a statement under sub-section (4) of section 132, admits the undisclosed income and specifies the manner in which such income has been derived. Neither in the assessment order nor in the penalty order,

this fact is pointed out by the AO that any statement was recorded u/s 132 (4) and some undisclosed income is admitted by the assessee in the same and the assessee has specified the manner in which such income has been derived.

10. Moreover, this is also an argument of the learned AR of the assessee in the written submissions filed by him before us that on the date of search, due date of filing return of income u/s 139 (1) for A. Y. 2013 – 14 had not expired because the search took place on 12.09.2013 and hence, there cannot be an allegation about existence of undisclosed income at any time before expiry of due date of filing return of income u/s 139 (1) on the basis of assumption that in the absence of search, the assessee would not have disclosed income on account of this transaction. This is also a submission that even after considering this transaction, there was a loss of Rs. 99,594/- under the head Income from Business and the same is accepted by the AO except making addition of Rs. 548,335/- and Rs. 265,000/- on account of disallowance of the assessee's claim of Improvement Cost and Business Expenses respectively and in respect of these two disallowances, separate penalty of Rs. 358,987/- was imposed u/s 271 (1) (c) of I T Act to the extent of 100% of tax sought to be evaded as per the AO. In view of these facts, we find force in this submission that there was no undisclosed income found because to arrive at undisclosed income, Gross Profit as worked out by the AO in Para 9.1 of the Penalty Order after reducing only cost of land and Development cost but without reducing other expenses is not justified and there was a loss of Rs. 99,594/- after considering the expenses and this loss is accepted by the AO also except disallowance of Rs. 548,335/- and Rs. 265,000/- on account of disallowance of the assessee's claim of Improvement Cost and Business Expenses respectively and for such disallowance, separate penalty of Rs.

358,987/- was imposed by the AO u/s 271 (1) (c) of IT Act to the extent of 100% of tax sought to be evaded as per the AO and hence, such disallowance is not a subject matter of penalty u/s 271 AAB. Before such disallowance, there is loss as claimed by the assessee after considering all expenses and hence, there is no undisclosed income in the present case for which, penalty u/s 271AAB can be imposed. We therefore, delete this penalty also.

11. In the result, all 13 appeals of the assessee are allowed.

Order pronounced in the open court on the date mentioned on the caption page.

Sd/-

(BEENA PILLAI)  
Judicial Member

Sd/-

(ARUN KUMAR GARODIA)  
Accountant Member

Bangalore,  
Dated, the 29<sup>th</sup> January, 2020.  
/MS/

Copy to:

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

By order

Assistant Registrar,  
Income Tax Appellate Tribunal,  
Bangalore.