

FIT FOR PUBLICATION

Sd/- Sd/-
(HSS) (ANM)
JM AM

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH: 'B': NEW DELHI)
(THROUGH VIDEO CONFERENCING)**

**BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER
AND
SHRI ANADEE NATH MISSHRA, ACCOUNTANT MEMBER**

**ITA No:- 5534/Del/2019
(Assessment Year: 2010-11)**

Deepak Wadhwa, New Delhi.	Vs.	ACIT, Circle 31(1), New Delhi.
PAN No: AAMPW5943Q		
APPELLANT		RESPONDENT

Assessee By : Shri Rajesh Mahna, Adv. and
Shri Mayank Kauth, Adv.
Revenue By : Shri Rajesh Kumar, Sr. DR

Per Anadee Nath Misshra, AM

(A) This appeal by Assessee is filed against the order of Learned Commissioner of Income Tax (Appeals)-11, New Delhi, ["Ld. CIT(A)", for short], dated 04.06.2019 for Assessment Year 2010-11. Grounds taken in this appeal of Assessee are as under:

"i. That the Ld. AO has erred in law and facts in initiating the penalty against the assessee under the provision of Section 271(1)(c) of the Income Tax Act, without understanding the applicability of the stated provisions, where the originally returned income has been accepted in Re-assessment order and Commissioner of Income Tax (Appeals) has failed to appreciate the facts and has confirmed the levy of penalty.

ii. Because the Ld. AO has erred in law and on facts in not appreciating that no addition has been made by him in assessment order and originally returned income

has been accepted thereby resulting in to no tax demand and Commissioner of Income Tax (Appeals) has fallen in error that there is any tax payable on the income shown to have been added as the result of any information of proceedings under section 147/143(3) of Income Tax Act.

iii. Because AO failed to appreciate that the information received was for the speculation profit of Rs. 6,62,000/- which stood already disclosed in the return and accepted in the return originally submitted in the return filed in response to Section 147/148 of the Income Tax Act, 1961, thereby leaving no basis for penalty, Commissioner of Income Tax (Appeals) has failed to appreciate the same.

iv. Because the AO has opted the provisions of Section 115BBE of the Income Tax Act to the facts and circumstances without appreciating that the provisions of Section 115BBE come into force w.e.f. 2012 and the AO can not invoke the provision which was not there on the statue book, the CIT(A) has failed to consider the order of the AO and written submission of the appellant. Thus the order of CI(A) is without application of mind and law.

v. The AO has imposed penalty without proper service of show cause notice as the notice was being sent at the old address inspite of sufficient knowledge of the new address. Any order without service of notice is nullity. Notice issued on 29.06.2018 and penalty imposed on 29.06.2018.

vi. Because the Ld. AO has erred in law and on facts in failure to aplicablity of provision of Income Tax Act and more specifically Section 271(1)(c) and 115BBE of Income Tax Act and levy of penalty is illegal, unreasonable, arbitrary. The CIT(A) has further failed to appreciate the law and written submission.

vii. Order of CIT(A) and AO are bad n law and on facts.

viii. Appellant craves your kind permission to add, amend and alter an of the grounds of appeal before or at the time of hearing."

(B) In this case, the Assessee filed the return of income on 15.10.2010 declaring income of Rs. 59,67,040/-. The returned income was accepted by Revenue, and the return was not selected for scrutiny. Thus, initially, no Assessment Order was passed. Subsequently, proceedings U/s 147 of IT Act were started on 29.03.2017 by issue of notice U/s 148 of IT Act. The Assessee, vide letter dated 27.04.2017 once again filed a copy of earlier return file on 15.10.2010, and once again showed

return income of Rs. 59,67,040/-. Assessment Order dated 29.12.2017 was passed U/s 147 of IT Act by Assessing Officer; assessing the assessee's income at the aforesaid amount of Rs. 59,67,040/- (same as returned income). However in the Assessment Order an amount of Rs. 6,62,000/- was excluded from the head "PGBP" (Profits and Gains of Business and Profession); and the same amount of Rs. 6,62,000/- was added U/s 68 of IT Act. In the result, assessed income of Rs. 59,67,040/- was the same as the returned income of Rs. 59,67,040/-. The Assessing Officer also levied penalty U/s 271(1)(c) of IT Act, amounting to Rs. 1,98,600/- vide order dated 29.06.2018, holding that the assessee had furnished inaccurate particulars of income. The Assessing Officer relied on judicial pronouncements in the cases of CIT vs. Indian Metals & Ferro Alloys Ltd. (1994) 117 CTR (Ori.) 378, CIT vs. Drapco Electric Corporation 106 ITR 359, Zoom Communication (P) Ltd., 327 ITR 510 the Hon'ble High Court of Delhi and CIT vs. Drapco Electric Corporation (Guj), 122 ITR 341. The Assessee filed appeal against the aforesaid order dated 29.06.2018 of the Assessing Officer passed U/s 271(1)(c) of IT Act before the Ld. CIT(A). Vide her impugned appellate order dated 04.06.2019, the Ld. CIT(A) dismissed Assessee's appeal holding that the appellant had no explanation for bogus income; while concluding that the assessee had shown bogus credit amounting to aforesaid Rs. 6,62,000/- . Ld. CIT(A) confirmed the penalty levied by the Assessing Officer U/s 271(1)(c) of IT Act. The present appeal before us has been filed by assessee against the aforesaid impugned appellate order dated 04.06.2019 of the Ld. CIT(A). Vide order dated 07.02.2020 recorded on Order

Sheet of the appeal folder; the assessee's appeal was found to be fit for Early Hearing. In the course of appellate proceedings in Income Tax Appellate Tribunal ("ITAT", for short); a paper book containing the following particulars were filed from the assessee's side:

1. *Memorandum of appeal in Form No. 36 in Triplicate.*
2. *Grounds of Appeal*
3. *Copy of Order of CIT(A) New Delhi dated 04.06.2019 appealed against*
4. *Copy of the penalty order passed by the AO*
5. *Copy of Assessment Order passed by the ACIT in Re-assessment proceedings*
6. *Copy of Grounds of appeal before CIT(A) filed by the appellant in Form 35*
7. *Copy of notice of the AO for the penalty proceedings with screen shot of ITD portal*
8. *Challan of fee of Tribunal*
9. *Power of Attorney*

(C) At the time of hearing before us, the Ld. Counsel for the Assessee vehemently contended that penalty U/s 271(1)(c) of IT Act levied in the case of the Assessee was erroneous in law, in the facts and circumstances of the case. He drew our attention to the fact that there was no addition to the returned income of the assessee either at the time when original return was filed on 15.10.2010 or in the course of proceedings U/s 147 of IT Act. He contended that the returned income of the assessee has been accepted by Revenue, in view of which penalty U/s 271(1)(c) of IT Act should be deleted. The Ld. Senior Departmental Representative ("Ld. Sr. DR" for short) relied on the order of the Assessing Officer and the Ld. CIT(A). He also drew our attention to the case laws i.e CIT vs. Indian Metals & Ferro Alloys Ltd. (supra), CIT vs. Drapco Electric Corporation (supra) Zoom Communication (P) Ltd.,

(supra) and CIT vs. Drapco Electric Corporation (Guj) (supra), which were mentioned by the Assessing Officer in the Assessment Order.

(D) We have heard both sides patiently. We have also perused the materials available on record. We find that there is no dispute between the two sides that the returned income of the assessee had been accepted on both occasions firstly, when return was filed on 15.10.2010; and secondly, when Assessment Order dated 29.12.2017 was passed U/s 147 of IT Act. Moreover, we find that the judicial pronouncements on which the Assessing Officer as well as the Ld. Sr. DR have placed reliance are not applicable to the facts of the case because in none of the aforementioned judicial pronouncements, assessed income was same as the returned income. The overall effect of the Assessment Order dated 29.12.2017 was that the head under which the aforesaid amount of Rs. 6,62,000/- was assessed, changed from income under "PGBP" (as shown by the assessee) to addition U/s 68 of IT Act, (as assessed by the Assessing Officer); in the process, however, assessing income of the assessee at income of Rs. 59,67,040/- which is same as the returned income of the assessee. The Assessing Officer as well as the Ld. CIT(A) have failed to make out a case for levy of penalty U/s 271(1)(c) of I.T. Act because they have been unable to show, when assessed income is same as returned income; whether, and if so, how allegation of furnishing of inaccurate particulars of income can be said to have resulted in tax sought to be evaded by the assessee. That there was some tax sought to be evaded by assessee, is a necessary condition for imposition of penalty U/s 271(1)(c) of IT Act. The allegation of the Ld. CIT(A) that the

assessee had the bogus income or bogus credit, is pointless, because the corresponding amount of Rs. 6,62,000/- was already included in the returned income of the assessee. For levy of penalty U/s 271(1)(c) of IT Act, what has to be shown is whether, and if so, how, assessee can be said to have sought to evade tax. The Assessing Officer, the Ld. CIT(A) and the Ld. Sr. DR have failed to establish conclusively that the assessee had sought to evade tax. In view of the foregoing, we are of the view that the penalty amounting to Rs. 1,98,600/-deserves to be cancelled in the facts and circumstances of the present case. Accordingly, penalty of Rs. 1,98,600/- is cancelled.

(E) In the result, appeal of the assessee is allowed.

Sd/-
(H.S. SIDHU)
JUDICIAL MEMBER

Sd/-
(ANADEE NATH MISSHRA)
ACCOUNTANT MEMBER

Dated: 07/01/2021
Pooja/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	04.01.21
Date on which the typed draft is placed before the dictating Member	04.01.21
Date on which the typed draft is placed before the Other Member	05.01.21
Date on which the approved draft comes to the Sr. PS/PS	05.01.21
Date on which the fair order is placed before the Dictating Member for pronouncement	05.01.21
Date on which the fair order comes back to the Sr. PS/PS	07.01.21
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	