

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "SMC-2": NEW DELHI
(Through Video Conferencing)**

**BEFORE
SHRI R.K. PANDA, ACCOUNTANT MEMBER**

ITA No. 6209/Del/2019 : Asstt. Year : 2011-12
ITA No. 6210/Del/2019 : Asstt. Year : 2012-13
ITA No. 6211/Del/2019 : Asstt. Year : 2013-14
ITA No. 6212/Del/2019 : Asstt. Year : 2014-15
ITA No. 6213/Del/2019 : Asstt. Year : 2015-16
ITA No. 6214/Del/2019: Asstt. Year : 2016-17

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| Honey Nayyar, C/o Anil Jain D.D. & Co. 611, Surya Kiran Building, K.G. Marg, New Delhi – 110 026 PAN AAFPN6537J | Vs. | ACIT, Central Circle-20 New Delhi. |
| (Appellant) | | (Respondent) |

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| Assessee by: | Shri Anil Jain, CA |
| Department by : | Shri Frat Khan, Addl. CIT(DR) |
| Date of Hearing | 15/02/2021 |
| Date of pronouncement | 31/03/2021 |

ORDER

PER R.K. PANDA, AM

The above batch of six appeals filed by the assessee are directed against the common order dated 27th May, 2019 of the Ld. CIT(A)-27, New Delhi relating to assessment years

2011-12 to 2016-17 respectively. Since identical grounds have been raised by the assessee in all these appeals, therefore, these were heard together and are being disposed of by this common order.

2. In all the appeals, the assessee has challenged the order of the Ld. CIT(A) in confirming the levy of penalty of Rs. 10,000/- for each of the assessment years levied by the AO u/s 271(1)(b) of the I.T. Act 1961.

3. Facts of the case, in brief, are that notices u/s 153A of the I. T. Act, 1961 were issued on 22.09.2017 for A.Ys. 2011-12 to 2016-17 and notices u/s 143(2) were issued on 22.09.2017 for A.Y. 2017-18. On 13.08.2018 notice u/s 142(1) alongwith questionnaires were issued to the assessee and case was fixed for hearing on 23.08.2018. On 07.09.2018 show cause notice of penalty u/s 271(l)(b) was issued for A.Ys. 2011-12 to 2017-18 and case was fixed on 14.09.2018. In compliance to the said notice the assessee filed copy of ITR and bank statement only. Another notice u/s 142(1) dated 05.10.2018 was issued to the assessee for appearing on 25.10.2018 with details enclosed with notice. However, no compliance was made by

assessee even to this notice for all these assessment years. The AO, therefore, issued show cause notice to the assessee asking him to explain as to why penalty u/s 271(1)(b) of the I.T. Act shall not be levied for all these assessment years. In absence of any compliance made by the assessee, penalty u/s 271(1)(b) was levied by AO on 06.12.2019 for A.Ys. 2011-12 to 2017-18.

4. Before the Ld. CIT(A), it was submitted that on 19.11.2018 the AR of the assessee appeared along with the letter stating there in that as the notice u/s 142(1) fixing the case for 25.10.2018 was not received by the assessee till 25.10.2018, compliance of the notice u/s 142(1) could not be made. In the office copy of reply of Sh. Neetu Nayyar the AO himself has signed and also noted some facts. Thus, there is no non-compliance on the part of the appellant. Further, in the penalty order the AO is talking about the non compliance of notice u/s 142(1) dated 05.10.2018 whereas in the show cause notice dated 09.11.2018 the Ld AO has mentioned that there is non-compliance of notice u/s 142(1) dated 16.10.2018. It was submitted that in the questionnaire dated

05/16.10.2018 attached along with notice u/s 142(1) very exhaustive details based on the seized material have been asked to be submitted by 25.10.2018 and this questionnaire was received after 25.10.2018.

5. Without prejudice to above, the assessee submitted that even for the sake of argument, if the above notice was received within 2-3 days of the notice dated 16.10.2018 - the details were not possible to be compiled upto 25.10.2018 on account of non-availability of reasonable time. And if the time allowed for the compliance of the notice is not sufficient, penalty u/s 271(l)(b) cannot be levied. For this proposition, the assessee relied on the judgment of the Delhi ITAT in the case of Chogori Distribution (P) Ltd vs DCIT, ITA 4435/Delhi/2015.

6. It was further submitted that the assessment in the instant cases have been completed by the AO u/s 153A/143(3). It was submitted that the courts and the Tribunal have held that when assessment has been completed u/s 143(3), penalty u/s 271(1)(b) cannot be imposed. For this proposition, the assessee placed reliance on the following

judgments:

- i. Globus Infocom Limited, New Delhi vs DCIT, Delhi ITAT, ITA 738/Del/2014
- ii. Akhil Bhartiya Prathmik Shikshak Sangh vs Assistant Director of income Tax, Delhi ITAT, ITA 2900/Del/2005

7. However, the Ld. CIT(A) was not satisfied with the arguments advanced by the assessee and confirmed the penalty levied by the AO u/s 271(1)(b) for all the years by observing as under :-

“6. All the grounds relate to issue of penalty u/s 271(l)(b) and are decided as under:

6.1 The chronology of events is as under:

- *Search and seizure operation was carried out in the "Nayyar" group on 18.11.2016.*
- *The case was centralized with Central Circle-19, New Delhi on 28.03.2017 and notices u/s 153A for A.Ys. 2011-12 to 2016-17 & 143(2) for A.Y. 2017-18 were issued by the Assessing Officer on 22.09.2017, in response to which the returns of income were filed by the appellant for these years on different dates before 31.03.2018.*
- *Proceedings u/s 143(2) were initiated on 08.08.2018. Subsequently notice u/s 142(1) was issued on 13.08.2018 containing 23 queries to be replied by 23.08.2018. Due to non compliance by the appellant the AO issued show cause notice of penalty u/s 271(l)(b) on 07.09.2018 for these assessment years and case was fixed on 14.09.2018. In response to it, only copy of ITR and bank statement*

were submitted on 10.09.2018 and no other details were filed.

- Another notice u/s 142(1) along with detailed questionnaire containing 14 queries and explanation of seized material was issued on 05.10.2018 for filing the details on 25.10.2018 for all these assessment years. There was no compliance by the appellant on 25.10.2018.
- A show cause notice dated 09.11.2018 for imposing penalty u/s 271(l)(b), for failure to furnish details u/s 142(1) dated 05.10.2018 was issued by the AO fixing the date of hearing on 19.11.2018. The appellant did not respond to the notice of the hearing on this date.
- The AO had issued prosecution notice u/s 276D dated 19.11.2018 to the appellant.
- The AO passed penalty order u/s 271(l)(b) on 06.12.2018 which is subject matter of appeal here.
- The appellant had filed first response to these notices by filing part details on 07.12.2018 for A.Ys. 2011-12 to 2017-18.
- A final show cause notice was issued by the AO on 17.12.2018, which was responded by the appellant on 19/20/22.12.2018. Final hearing was conducted on 26.12.2018 before passing the orders on 29.12.2018.

6.2 There are further some more facts relevant to the case.

Although the notice u/s 142(1) is dated 5.10.2018, the questionnaire attached to this notice was sent on 16.5.2018 as is evident from the hand written date on the questionnaire and verifiable from dispatch register of AO. Thus the period of service of notice u/s 142(1) may be considered from issue date of 16.10.2018 instead of 5.10.2018 as without

questionnaire the appellant could not had replied the notice and it might have taken 2-3 days for service of it.

6.3 The submissions of the appellant are considered in the light of above facts

6.3.1 The appellant had taken the first plea that it appeared on 19.11.2018 before the AO with a letter stating that the notice dated 5.10.2018 was not received by it before 25.10.2018. He claims that the AO had written in his own hand writing on similar letter in the case of group assessee Mr. Neetu Nayyar to appear in person & discuss with all facts why notice was not received. As per the assessment records, neither there is any such letter in the case of the appellant on record nor any evidence had filed before the AO to support its stand of non receipt of notice u/s 142(1).

6.3.1.1 Further the appellant had taken the without prejudice stand that even if it is presumed that notice was received within 2-3 days of date of issue on 16.10.2018, there was not enough time to respond these queries by 25.10.2018. It is observed from the sequence of events given in above para that there was no compliance of notices u/s 142(1) issued on 30.08.2018 & 05.10.2018 and the AO was forced to issue penalty notices

on -07.09.2018 & 09.11.2018 apart from the prosecution notice on 19.11.2018 to elicit response from the appellant, which was first made on 07.12.2018. The AO was left with no option but to levy penalty on 6.12.2018 even after waiting for one & half month for the reply/details from the appellant. It was after the order of penalty u/s 271(l)(b) passed by the AO on 06.12.2018, when the appellant first responded to the AO on 07.12.2018. There was no request for adjournment at any point of time in the whole proceedings citing plausible reasons for delay in submission of details. Although AO had not levied any penalty for non compliance of earlier 142(1) notice dated 30.8.2018, there was no compliance of even this earlier notice by the appellant till December 2018. The case was time barring on 31.12.2018 and first compliance to 142(1) notices, dated 30.8.2018 & 5/16.10.2018, was made on 7.12.2018. Thus there was deliberate attempt on the part of the appellant to delay the compliance of the details asked by AO, to prevent the AO from investigation of issues, by squeezing the time at the disposal of the AO. Thus this plea of the appellant is also rejected considering the overall behaviour of the appellant regarding compliance before the AO.

6.3.2 The argument of the appellant that the notice u/s 142(1) was dated

5.10.2018 whereas the penalty notice u/s 271(l)(b) states date of notice as 16.10.2018. These facts have been clarified in the above para 6.2. The notice was dated 5.10.2018, but the questionnaire referred in notice was later modified & made dated 16.10.2018 and the notice dated 5.10.2018 with questionnaire was sent to the appellant apparently on 16.10.2018 only. The non-compliance to the questionnaire dated 16.10.2018 mentioned in notice u/s 142(1) is the issue. Thus both the dates refer to the same notice only, one is date of issue & other is date of dispatch of notice with questionnaire. Thus there is no ambiguity on this account and plea of the appellant is rejected on this ground.

6.3.3 Another argument taken by the appellant is that the orders have been passed by the AO u/s 143(3) r.w.s. 153A and in view of case laws cited by him including that of ITAT Delhi, the penalty cannot be levied in such cases. In the present facts of the case, it is clear that AO was prejudiced by the continuous default of non compliance without any "reasonable cause" on the part of the appellant. The penalty order u/s 271(l)(b) has been passed by the AO on 06.12.2018 and the first compliance of the notice has been made by the appellant on 07.12.2018. The final orders have been passed by the AO u/s 143(3) r.w.s 153A as there was subsequent compliance by the appellant, but many details had

to be accepted on face of it by the AO due to no time left for investigation or verification of these details from independent sources. In fact the compliance of the appellant started after levy of penalty by AO and till the time of passing penalty order on 06.12.2018, there was no compliance by the appellant. Thus the act of appellant had severely hampered the assessment proceedings and caused prejudice to it. There was no "reasonable cause" on the part of appellant to explain such delay. The appellant did not had the courtesy even to apply for adjournment. There were blatant deliberate defaults in compliance to prevent the AO from making proper investigation/verification. Thus the case of appellant cannot be said to factually fall in the category of cited case laws by the appellant. Thus, this plea of the appellant is also rejected.

6.4 In the facts & circumstances of the case and the discussion made in the para 6.3 above, it is held that the appellant had deliberately defaulted on various occasions without any "reasonable cause" to file the requisite details. The appellant had not bothered to even ask for adjournments, if it was taking time to prepare details. The non compliance of notices had led to severe prejudice in the investigation process during assessment proceedings to the AO. Even the penalty notices u/s 271(l)(b) on two

occasions and prosecution notice issued by the AO could not elicit the compliance from the appellant. Although the AO had not levied any penalty for the show cause notice of penalty u/s 271(l)(b) issued by him on 07.09.2018, the AO had levied penalty for notice u/s 271(l)(b) issued by him on 05.10.2018 after observing the habitual non-compliant behaviour of the appellant. The appellant had waited till the levy of penalty u/s 271(l)(b) on 6.12.2018, to file first set of submissions after it on 07.12.2018. Thus till the passing of penalty order u/s 271(l)(b) by AO on 06.12.2018, there was no compliance on part of appellant of the notices u/s 142(1) issued by the AO on 5/16.10.2018. The penalty order had been passed after one & half months of due date of filing of submissions by the appellant. Even considering the possible delay in service of notice, the appellant had not bothered to file the requisite details for a long period of time without assigning any "reasonable cause" for such delay or any adjournment letter seeking more time from AO. The appellant had not brought on records either during penalty proceedings or during appellant proceedings any "reasonable cause" for default in complying with the notice u/s 142(1) dated 5/16.10.2018. Hence I find no reason to interfere with the penalty orders of the AO. *Therefore,, the penalty levied by the*

AO u/s 271(l)(b) for AY 2011-12 to 2016-17 is hereby confirmed and appeals of the appellant for these years are dismissed.”

8. Aggrieved with such order of the Ld. CIT(A) the assessee is in appeal before the Tribunal.

9. Ld. Counsel for the assessee strongly challenged the order of the Ld. CIT(A) in confirming the levy of penalty u/s 271(1)(b) of the I.T. Act for all these years. He submitted that the assessment in the instant case was ultimately completed u/s 143(3) of the Act. Referring to various decisions filed in the synopsis Ld. Counsel for the assessee submitted that it has been held in all these decisions that where the assessee has not made any compliance on certain dates but ultimately due compliance was made and replies filed by the assessee and had participated in the proceedings before the AO and the assessment has been completed u/s 143(3) then penalty should not be levied u/s 271(1)(b) of the Act for non compliance of particular notice merely on technical grounds. He submitted that the AO in the instant case has levied penalty for non compliance to the notice dated 5th October

2018 whereas in the show cause notice dated 9.11.2018 the AO has mentioned that there was non compliance of notice u/s 142(1) dated 16th October 2018. He submitted that even for the sake of arguments if the above notice was received within two three days of the notice dated 16th October 2018 even then also the huge details as asked for by the AO was not possible to be submitted up to 25th October, 2018 on account of non availability of reasonable time. Referring to the decision of the Tribunal in the case of Smt. Neetu Nayyer vs. ACIT and Smt. Meena Nayyar vs ACIT vide ITA Nos. 6189/Del/2019 to ITA No. 6194/Del/2016-17 and ITA No. 6195/Del/2019 to ITA No. 6200/Del/2019 for assessment years 2011-12 to 2016-2017 respectively vide order dated 22.12.2020, he submitted that under identical circumstances, the Tribunal has deleted the penalty so levied by the AO and sustained by the Ld. CIT(A). He accordingly submitted that the penalty sustained by the Ld. CIT(A) deserves to be deleted.

10. Ld. DR on the other hand relied on the order of the Ld. CIT(A). He submitted that Ld. CIT(A) has given elaborate reasons as to why the penalty levied by the AO in the instant

case should be sustained. He accordingly submitted that the order of the Ld. CIT(A) should be upheld.

11. I have heard the rival arguments made by both the sides and perused the material available on record. I find that AO in the instant case levied penalty of Rs. 10,000/-each u/s 271(1)(b) of the Act for assessment year 2011-12 to 2016-17 on the ground that assessee did not respond to the notice dated 5th October 2016 fixing the hearing for 25th October, 2018. I find Ld. CIT(A) upheld the penalty levied by the AO, the reasons for which have already been reproduced in the preceding paragraphs. It is the submission of the Ld. Counsel for the assessee that the assessment was ultimately completed u/s 143(3) of the Act and, therefore, penalty should not be levied merely on technical reasons. Further, it is also his submission that under identical circumstances the coordinate bench of the Tribunal in the case of Smt. Neetu Nayyar vs ACIT and Smt. Meena Nayyar vs. ACIT (supra) has deleted the penalty levied by the AO and sustained by the Ld. CIT(A).

12. I find some force in the above arguments of the Ld. Counsel for the assessee. Although the assessee in the

instant case has not complied to the statutory notice issued by the AO on 5th October, 2016 fixing the case for hearing on 25th October, 2018 which is the basis for levy of penalty u/s 271(1)(b) of the Act, however, ultimately the order has been passed u/s 143(3). Coordinate Benches of the Tribunal in a number of decisions have held that where the assessment order was finally passed u/s 143(3) and not u/s 144 of the Act due to subsequent compliance during the assessment proceedings, that would be considered as good compliance and the defaults committed earlier should be ignored and taking a lenient view the penalty u/s 271(1)(b) of the I.T. Act 1961 should not be levied. Further, the Coordinate Bench of the Tribunal in the case of one of the group member namely Smt. Neetu Nayyar vs ACIT and Smt. Meena Nayyar vs. ACIT (supra) has also deleted the penalty levied by the AO u/s 271(1)(b) and sustained by the Ld. CIT(A) under identical circumstances. Since the assessment in the instant case has ultimately been completed u/s 143(3) of the Act on the basis of various details filed by the assessee before the AO, therefore, considering the totality of the facts of the case and relying on the decision of the Tribunal in the case of Smt.

Neetu Nayyar vs. ACIT (supra) and Smt. Meena Nayyer vs. ACIT (supra) I am of the considered opinion that it is not a fit case for levy of penalty u/s 271(1)(b) of the Act. I, therefore, set aside the order of the Ld. CIT(A) and direct the AO to cancel the penalty so levied by him for all the 6 years. The grounds raised by the assessee are accordingly allowed.

13. In the result, all the 6 appeals filed by the assessee are allowed.

**Order pronounced in the open court on
31/03/2021.**

sd/-
(R.K. PANDA)
ACCOUNTANT MEMBER

Dated: 31/03/2021

Veena

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi