

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C”BENCH: BANGALORE**

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER**

ITA No.2646/Bang/2019
AssessmentYear:2007-08

M/s. Star Electricals Sy.No.120/2, Kodathi Gate Mullur Road Off Sarjapura Road Bangalore 560 035 PAN NO :AAEFS1483K	Vs.	ACIT Circle-10(1) Bangalore
APPELLANT		RESPONDENT

ITA No.2647/Bang/2019
Assessment Year: 2007-08

M/s. Yeshoda Electricals Sy.No.120/2, Kodathi Gate Mullur Road Off Sarjapura Road Bangalore 560 035 PAN NO :AAAFY0757E	Vs.	ACIT Circle-10(1) Bangalore
APPELLANT		RESPONDENT

Appellant by	:	Shri Guruswamy H., A.R.
Respondent by	:	Shri Pradeep Kumar, D.R.

Date of Hearing	:	20.07.2021
Date of Pronouncement	:	20.07.2021

ORDER

PER B.R. BASKARAN, ACCOUNTANT MEMBER:

Both the appeals filed by the respective assesseees are directed against the orders passed by Ld. CIT(A) in their respective hands confirming the demand raised by way of penalty u/s 221(1) of the Income-tax Act,1961 ['the Act' for short] for AY 2007-08. Since the issue urged in these appeals and the underlying facts are identical in nature, both the appeals were heard together and are being disposed of by this common order for the sake of convenience.

2. The Ld. A.R. appearing for the assesseees submitted that the A.O. had reopened the assessment of both the assesseees for AY 2007-08 and passed the assessment order in their respective hands u/s 144 r.w.s. 147 of the Act by making disallowances u/s 40(a)(ia) of the Act and also disallowing marketing expenditure. Accordingly, the A.O. raised a demand of Rs.3.39 crores in the hands of M/s. Star Electricals and Rs.5.09 crores in the hands of M/s. Yeshoda Electricals. Both the assesseees did not pay the tax demanded by the AO. They challenged the assessment order by filing appeal before Ld CIT(A) and then before ITAT. Before the Tribunal, both the assesseees challenged the validity of reopening of assessment also.

3. In the mean time, the A.O. also passed penalty order in the hands of both the assesseees by levying penalty u/s 221(1) of the Act, since they have not paid taxes demanded in the assessment order. The AO levied penalty of Rs.36.31 lakhs in the hands of M/s. Star Electricals and Rs.55.06 lakhs in the hands of M/s. Yeshoda Electricals u/s 221(1) of the Act. The appeals filed by the

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assessee challenging the above said levy of penalty before Ld CIT(A) were dismissed and hence the assessee have filed these appeals before the Tribunal.

4. The Ld. A.R. submitted that the appeal filed by M/s Star Electricals against quantum assessment orders before the Tribunal was numbered as 1177/Bang/2016 and that filed by M/s. Yeshoda Electricals was numbered as 1175/Bang/2016. He submitted that the Tribunal has since disposed of both the appeals by a common order dated 3.2.2021. In the above said common order, the Tribunal has held that the reassessment proceedings initiated in AY 2007-08 in the hands of both the assessee were invalid. Accordingly, the assessment orders passed in the hands of both the assessee have been quashed. The Ld. A.R. submitted that the tax demand raised in the assessment order shall become nil, as a result of the orders passed by the Tribunal. Since the impugned penalty has been levied u/s 221(1) of the Act for non-payment of tax demanded in the assessment order and since the assessment order itself has been quashed in the hands of both the assessee, there will be no pending tax demand and consequently, the impugned penalty cannot stand on its own. Accordingly, the Ld A.R prayed for quashing of impugned penalty orders.

5. We heard Ld D.R and perused the record. In these two cases, the AO has levied penalty u/s 221(1) of the Act. The provisions of sec.221 read as under:-

“221. Penalty payable when tax in default.–(1) When an assessee is in default or is deemed to be in default in making a payment of tax, he shall in addition to the amount of the arrears and the amount of interest payable under sub-section (2) of section 220, be liable, by way of penalty, to pay such amount as the assessing officer may direct, and in the case of a continuing default, such further amount or amounts as the assessing officer may, from time to time, direct, so, however, that the total amount of penalty does not exceed the amount of tax in arrears :

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Provided that before levying any such penalty, the assessee shall be given a reasonable opportunity of being heard :

Provided further that where the assessee proves to the satisfaction of the assessing officer that the default was for good and sufficient reasons, no penalty shall be levied under this section.

Explanation.—For the removal of doubt, it is hereby declared that an assessee shall not cease to be liable to any penalty under this subsection merely by reason of the fact that before the levy of such penalty he has paid the tax.

(2) Where as a result of any final order the amount of tax, with respect to the default in payment of which the penalty was levied, has been wholly reduced, the penalty levied shall be cancelled and the amount of penalty paid shall be refunded.”

A perusal of above said provisions would show that the assessee is liable to pay penalty under sec.221(1), if the assessee is in default or is deemed to be in default in making a payment of tax. In the instant cases, the penalty proceedings u/s 221(1) has been initiated by the AO, since both the assesseees have failed to pay the demand raised in the reassessment order and hence they have become “assessee in default”. However, the provisions of sub. Sec. (2) further state that the penalty levied shall be cancelled, where **as a result of final order** the amount of tax, with respect to the default in payment of which the penalty was levied, has been wholly reduced.

6. In the instant cases, as on today, the assessment orders have been quashed by the Tribunal, vide its order dated 03-02-2021 (referred above) in the hands of both the assesseees by holding that reopening of assessment is invalid. Hence, as on today, the demand has become Nil. Accordingly, as per the provisions of sub. Sec. (2) of sec. 221, the penalty levied u/s 221(1) is liable to be cancelled, if the orders passed by the Tribunal becomes final order, i.e., the operation of sub. Sec (2) would depend upon the question

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as to whether the orders passed by the Tribunal have become “final” or not? If the revenue has accepted the orders passed by the Tribunal in the hands of both the assesseees, then the same will result in a final order, in which case, the impugned penalty levied u/s 221(1) of the Act shall be liable to be cancelled.

7. On the contrary, if the revenue challenges the orders passed by the Tribunal by filing appeals before Hon’ble High Court, then the question as to whether the order of the Tribunal is final order or not would depend upon the outcome of the appeals.

8. Keeping in mind above said legal position, we hold that the impugned penalty levied in the hands of both the assesseees is liable to be quashed. We order accordingly. However, in the event of reversal of orders passed by the Tribunal in the quantum proceedings in the hands of both the assesseees for AY 2007-08, the impugned penalty levied u/s 221(1) in the hands of both the assesseees shall revive. In that event, both the parties are liberty to prosecute their respective cases in accordance with the law.

9. In the result, both the appeals of the assesseees are treated as allowed.

Order pronounced in the open court on 20th Jul, 2021.

Sd/-
(N.V. Vasudevan)
Vice President

Sd/-
(B.R. Baskaran)
Accountant Member

Bangalore,
Dated 20th Jul, 2021.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.