

**IN THE INCOME TAX APPELLATE TRIBUNAL
LUCKNOW BENCH “SMC”, LUCKNOW**

[Through Virtual Hearing]

BEFORE SHRI T.S. KAPOOR, ACCOUNTANT MEMBER

**ITA Nos. 548 & 549/Lkw/2018
Assessment Year 2010-11**

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| M/s Naiyer Associates, C/o Sri M.T. Rizvi, Advocate, 3 V.L. Nagar, Sitapur 261 001 PAN – AADFN 8688C (Appellant) | Vs . | ITO -3(2), Lucknow (Respondent) |
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| Appellant by | Application dtd. 24.8.2021 of Firm's partner |
| Respondent by | Shri Ajay Kumar, DR |
| Date of hearing | 07/09/2021 |
| Date of pronouncement | 22/09/2021 |

ORDER

These are two appeals filed by the assessee against the separate orders of Id. CIT(A) dated 29.03.2018 and 30.03.2018 respectively. Earlier these appeals were dismissed for non prosecution vide order of the Tribunal dated 18.01.2019. However the said order of the Tribunal was recalled by the order of the Tribunal dated 19.05.2019 and these appeals were fixed for hearing on merits.

2. The appeal in ITA No. 548/Lkw/2018 is appeal against the imposition of penalty u/s. 271(1)(c) of the Act, whereas the appeal in ITA No. 549/Lkw/2018 is appeal against quantum additions. No one was present on behalf of the assessee when these appeals

were called for hearing. However, there is an application filed by the assessee wherein it has been mentioned that the firm has been closed due to heavy losses and it cannot afford services of any lawyer and these appeals be decided on the basis of written submissions filed by him. So in view of these facts and circumstances, I took consent of Id. DR and he stated that since no one is appearing and these are quite old appeals, therefore, these can be disposed off on the basis of written submissions filed by the assessee. The Id. DR, however, submitted that he strongly relies on the orders of authorities below and therefore the appeals filed by the assessee may be dismissed.

3. While going through the appeals files, I noticed that in appeal in ITA 549/Lkw/2018, the assessee is aggrieved with the additions, which the Id. CIT(A) had sustained. The grounds of appeal taken by the assessee are argumentative in nature. However, the facts which emerge from the material on record is that the assessment order has been passed on 12.09.2016 in view of ITAT order in ITA No. 832/Lkw/2014 dated 31.08.2015 where the Tribunal had set aside the matter on two issues back to the file of the Assessing Officer. The Assessing Officer in view of remand computed the net profit of the assessee by applying net profit of 7% and also added back the profit on sale of fixed assets to the extent of Rs.1,05,000/-

4. On appeal before the Id. CIT(A), the assessee took a ground that the Assessing Officer had not allowed salary and interest to partners against the estimated profit to which Id. CIT(A) did not agree as in his opinion in the earlier round, the ITAT, Lucknow vide order dated 31.08.2015 had already confirmed the findings of Id. CIT(A) to this extent. In this respect, I have gone through the order

passed by the Tribunal in ITA No. 832/Lkw/2014 and I find that the Tribunal vide para 5 and 6 has rejected the contentions of assessee and has confirmed the finding of Id. CIT(A) by holding as under:-

“5. We have considered the rival submissions. Regarding Ground no.1 of the assessee, we find force in the submission of Ld. DR of the Revenue that in the present case, there is no enhancement by Ld. CIT(A) in respect of disallowance of interest and salaries paid to partners because the same was not allowed by the AO also and therefore, there was no requirement to issue notice u/s 251(2) of the Act by Ld. CIT(A). Therefore, Ground No.1 (a) of the assessee is without any merit.

6. Regarding the merit of the allowability of deduction in respect of interest and salary paid by the assessee firm to its partners, it is seen that this aspect was decided by Ld. CIT(A) in view of the provisions of Section 184(5) and 185 of the Act. We also find that in the assessment order, it is observed by the AO that no bills/vouchers and books of account or any other supporting vouchers have been produced before him and therefore, he had no option but to estimate the income to the best of his judgment. He has invoked the provision of Section 144 of the Act although not specifically stated in the assessment order. As per sub section (5) of section 184, where there is on the part of firm any such failure as mentioned in section 144, the firm shall be assessed without allowing deduction of any payment of interest and salary etc. to any partner of the firm in computing the income chargeable under the head business income. Hence, in the facts of the present case, Section 184(5) of the Act is applicable and as a consequence, deduction on account of interest and salary payment to partners is not allowable. Hence, on this issue, we do not find any reason to interfere in the order of the Ld. CIT(A). Accordingly, Ground No. 1 and 2 are rejected.”

5. The assessee if aggrieved with such Tribunal order should have approached the Hon'ble High Court or should have filed miscellaneous application before this Tribunal for rectification of mistake if any which it has not done and through the grounds of appeal the assessee wants the Tribunal to review its own order which is not permissible in law, therefore, appeal in ITA No. 549/Lkw/2018 is dismissed.

6. Now, coming to appeal in ITA No. 548/Lkw/2018 I find that this appeal is against imposition of penalty which the Assessing Officer has imposed for concealment of income. I find that the Assessing Officer in this case has estimated the income of the assessee by applying the net profit ratio and has rejected the books of accounts whereas the assessee had filed audited statements of account. The assessee in the written submission has submitted that assessee has faithfully discharged its onus to get the accounts audited and Assessing Officer had wrongly rejected the same and had not allowed the interest and remuneration to the partners. I find that penalty u/s. 271(1)(c) of the Act is imposable on an assessee if an assessee conceals its income or furnishes wrong particulars of income. Since the books of account of the assessee has been rejected and total income has been computed on the basis of N.P. ratio there is no scope for imposition of penalty u/s. 271(1)(c) of the Act. In a number of judgment of various Benches of the Tribunal and courts this view that once books of account are rejected and income is estimated by applying N.P. rate, penalty u/s. 271(1)(c) is not imposable.

7. Under these circumstances, Hon'ble Allahabad High Court in the case of Naresh Chand Agarwal vs. CIT [2013] 357 ITR 514 (All) has held as under:

"Penalty proceedings—Books rejected—Profit estimated—No evidence of concealment— Penalty initiated—Leviability—Original return was filed declaring income—After notice, assessment was completed u/s 143(3) on enhanced income by rejecting books of accounts u/s 145—CIT(A) partially allowed assessee's appeal— Tribunal remanded back matter— AO passed an order where interest on FDRs was showed separately as income from other source & further addition was made by computing net profit rate at 8 percent u/s 44AD—Penalty was levied by AO—Held, In instant case, nothing was concealed by assessee —It was A. O, who had rejected books of account In second round & applied 8 percent net

profit rate prescribed u/s 44 AD—It was held that turnover was more than 40, so Section 44 AD was not applicable—Rejection of books of account a flawed-A.O. to make addition on estimate basis—It was held that when addition was made on estimate basis, no penalty u/s 271 (l)(c), could be imposed—In case of C.I.T. vs. Arjun Prasad Ajit Kumar, (2008) 214 CTR (All) 355, it was observed that CIT (A) deleted penalty u/s 271(l)(c) on ground that there being nothing on record that assessee's explanation lacked bona fides, penalty u/s 271(l)(c) could not be imposed on basis of estimating sales & making addition by applying net profit rate—Moreover, it may be mentioned that no finding of deliberate concealment of income was brought in instant case as assessee had never suppressed Interest income from FDRs—It was for A.O. to treat this income as business income or income from other sources—So no penalty for concealment was leviable."

In view of the above facts and circumstances of the case, I hold that the penalty imposed by Assessing Officer u/s 271(1)(c) of the Act is not leviable.

8. In view of above, the appeal in ITA No. 548/Lkw/2018 is allowed.

9. In the combined result, appeal In ITA No. 548/Lkw/2018 is allowed and Appeal in ITA No. 549/Lkw/2018 is dismissed.

(Order pronounced in the open court on 22/09/2021)

Sd/-
(T.S. KAPOOR)
ACCOUNTANT MEMBER

Aks -
Dtd. 22/09/2021

Copy of order forwarded to:

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| <i>(1) The appellant</i> | <i>(2) The respondent</i> |
| <i>(3) Commissioner</i> | <i>(4) CIT(A)</i> |
| <i>(5) Departmental Representative</i> | <i>(6) Guard File</i> |

By order

Assistant Registrar