

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL,
JAIPUR BENCHES,"A" JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री राठोड कमलेश **जयन्तभाई**, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA No. 134/JP/2021
निर्धारण वर्ष / Assessment Year : 2011-12

Shri Mahaveer Prasad M/s. Mahaveer Khad Beej Bhandar Bhindusi, Alwar -391 411 (Raj)	बनाम Vs.	The ACIT Circle-1 Alwar (Raj)
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ABOPP 9808 Q		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : None
राजस्व की ओर से / Revenue by: Smt. Monisha Choudhary (JCIT)

सुनवाई की तारीख / Date of Hearing : 02/02/2022
उदघोषणा की तारीख / Date of Pronouncement: 16 /02/2022

आदेश / ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

This appeal by the assessee is directed against the order of the Id. CIT(A), dated 26-06-2021, National Faceless Appeal Centre, New Delhi [hereinafter referred to as (NFAC)] for the assessment year 2011-12.

2. The hearing of the appeal was concluded through video conference in view of the prevailing situation of Covid-19 Pandemic.

3. The assessee has taken following grounds which are reproduced here in below ;

"1. On the fact and in the circumstances of the case the Id. CIT (A) has erred in confirming penalty of Rs.20000/- imposed by the Id. AO and in dismissing the appeal of the appellant assessee.

2. That the Id. CIT (A) has dismissed the appeal of the appellant without providing sufficient opportunity of being heard and without following the principle of natural justice

Additional ground

3. That the Id. AO i.e. ITO, Bhiwadi had imposed the penalty of Rs.20000/- under section 271 (1)(b) without jurisdiction therefore the penalty levied by him deserve to be cancelled.

4. That the Id. AO had imposed penalty under section 271 (1)(b) on the basis of a defective notice issued under section 274 r.w.s. 271 (1)(b) of the act without specifying the nature of default, therefore the penalty imposed under section 271 (1)(b) on the basis of a vague and defective notice deserve to be quashed/cancelled.

5. That the Id AO imposed the penalty under section 271(1)(b) on the basis of an assessment order passed under section 144 r.w.s. 148 dated 8.10.2018 which itself was invalid and bad in law therefore penalty proceedings initiated on the basis of an invalid assessment order are also bad in law and deserve to be quashed.

Ground number 3 to 5 are legal grounds and have been taken up before the lower authorities and are being taken up before the Hon'able ITAT for the first time as additional grounds. For adjudication' of these grounds no further investigation is required therefore, these may kindly be admitted for the cause of substantial justice, in view of decision of Hon'able supreme court in the case of NTPC vs. CIT (1998) 229 ITR 383 (SC).

That the appellant craves leave to add, amend or withdraw any of the grounds of appeal during the appellate proceedings.”

4. Brief facts of the case are that the AO had information that the assessee has made cash deposit of Rs. 12,16,500/- in his saving bank account during the F.Y. 2010-2011. But the assessee did not file return of income for A. Y. 2011-2012 as per provisions of section 139(1)/139(4). Therefore, the case was reopened by issuing Notice u/s. 148 on 28.03.2018. The assessment was completed u/s. 144 r.w.s. 148 of the Income Tax Act, on 08.10.2018. The assessee was issued notices u/s. 142(1) of the IT Act on 14.08.2018 and 24.08.2018. On the fixed dates of hearing, the assessee did not file any reply.

Due to this reason, a show cause notice u/s. 274 r.w.s. 271(1)(b) was issued on 08.10.2018 and there was no compliance to the said show cause notice by the assessee. Vide another letter dated 03.04.2019, the assessee was provided another opportunity to file reply to the show cause notice of penalty. But again the assessee did not respond. Hence, the AO levied penalty of Rs. 20,000/- u/s. 271(1)(b) for defaults on two occasions. The matter carried to before the Id. CIT(A) and thereafter the appeal was transferred to NFAC and the Id. CIT(A), NFAC has passed an order dated 26.06.2021 confirming the order and aggrieved the assessee filed appeal before this tribunal.

5. Thus, the only issue in this appeal of the assessee is regarding levy of penalty imposed under section 271(1)(b) of the Income Tax Act, 1961 amounting to Rs. 20,000 confirmed by the Id. CIT(A), NFAC.

6. At the time of hearing, none appeared on behalf of the assessee. The Ld. AR submitted written submission on e-mail where in the written contentions were raised on merits as well as on technical grounds which includes the jurisdiction also.

7. On perusal of the assessment order, it is revealed that the notice under section 148 of the Act was not served to the assessee as it is appearing from the assessment order. Therefore, the notice was affixed by the Income Tax Officer, Ward, Bhiwadi [herein after referred to as ITO]. The learned AR of the

assessee placed on record the copy of the affixture made at the address of the assessee made by ITO which is a village.

7.1 Consequent to the order u/s. 127 of the Act, the case was transferred to Assistant Commissioner of Income Tax, Circle-1, Alwar [herein after referred to as (ACIT)]. The said ACIT has issued two notices under section 142(1) dated 14.08.2018 and 24.09.2018 and it has been alleged by ACIT that both the notices were remained uncomplied with by the assessee. Therefore, he has in the assessment order passed under section 144 r.w.s 148 initiated penalty proceeding under section 271(1)(b) of the Act. It is not clear that whether these notices were served or affixture were made as the original notice under section 148 is not served and the affixture was made as evident from the records placed by the Id. AR of the assessee and confirmed in the assessment order.

7.2 The ITO has passed an order dated 26.04.2019 levying penalty of Rs. 20,000/- for the alleged notice issued by the ACIT under section 142(1) dated 14.08.2018 and 24.09.2018. There is specific ground of jurisdiction taken by the assessee in this appeal. Looking to the above clear facts of the case, it is not clear as to whether the impugned notices were served to the assessee or not.

8. On the other hand, the learned DR has stated that the assessee remained non-compliant in the assessment proceeding and has also not participated in the appellate proceeding even though the issue of various notices by NFAC and sought an adjournment only. He further draws our attention that notice dated

11.01.2021 asking the assessee to file submission on or before 26.1.2021. The said notice was responded on 01.02.2021 requesting to adjourn the hearing as reply not prepared and requested to condone the delay in reply to the notice.

9. Another notice dated 17.02.2021 asking the assessee to file reply on or before 04.03.2021. The said notice as responded on 15.04.2021 seeking time where in the reason for adjournment was written as under;

“It is to bring to your kind attention that our Counsel Mr. Shri Chand Gupta has died and now we have appointed new counsel for our case. It is to request you to kindly provide us with some more time and also request you to kindly not order the case as ex-parte as the new counsel needs some time to take over the case and prepare his reply in this regard.”

10. On perusal of the above facts, it is clear that even though on account of pandemic everyone is working with limited resources and have to follow the guideline of working with limited resources, not only that the earlier consultant left heavenly abode and new one has to defend the case. The Hon'ble Supreme Court extended all the limitation whether condonable or not, in that situation not allowing the time in the period of pandemic, even the matter is not getting time barred. Thus, the order passed by the Id. CIT(A) NFAC is against the principles of natural justice. Looking to the fact available before us, that the notice u/s. 148 is not served and affixture was made in that factual information it is not clear as to whether the alleged notice issued by the ACIT, for which non-compliance is alleged is really served or not and if so how.

11. We have considered the rival contentions raised and we find that there was no proof that the alleged notice is really served to the assessee or not. The penalty under Section 271(1)(b) could not be imposed for each and every notice issued under Section 142(1)/143(2), which remained not complied with on the part of the assessee. The provision of Section 271(1)(b) is of deterrent nature and not for earning revenue mechanically. Any other view taken shall lead to the imposition of penalty for any number of times (without limits) for the same default of not appearing in response to the notice issued. This does not seem to be the intention of the legislature in enacting the provisions of Section 271(1)(b) of the Act. In case of failure of the assessee to comply with the notice under Section 142(1)/143(2) of the Act, the remedy with the Assessing Officer lies with framing of "best judgement assessment" under the provisions of Section 144 of the Act and not to impose penalty under Section 271(1)(b) of the Act again and again and in fact in this assessment is already framed as best judgment assessment. In addition, in the present case it is not clear as to whether the alleged two notices is really served or not, is not clear from the lower authority's order. Not only that the assessee has challenged the jurisdiction as the ACIT has alleged violation of penalty on account of non-compliance whereas order of penalty is levied by ITO who already knows that the even the notice u/s. 148 has not been served in this case, and he remained to be silent on the issue of service of the impugned notices and levied the penalty

mechanically. Looking to these factual back ground, it is not clear that whether alleged two notices are really served or not and in that scenario the benefit of doubt goes to assessee and in those circumstances, we are of the view that the levy of penalty of Rs. 20,000/- levied by ITO is bad in law as well as on facts and the same is deserved to be deleted.

12. In the result, the appeal of the assessee is allowed.

Sd/-
(संदीप गोसाईं)
(Sandeep Gosain)
न्यायिक सदस्य / Judicial Member

Sd/-
(राठोड कमलेश जयन्तभाई)
(Rathod Kamlesh Jayantbhai)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 16/02/2022

*Mishra

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. The Appellant- Shri Mahaveer Prasad, Mahaveer Khad Beej Bhandawr, Alwar.
2. प्रत्यर्थी / The Respondent- The ACIT, Circle-1, Alwar.
3. आयकर आयुक्त / The Id CIT
4. आयकर आयुक्त(अपील) / The Id CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 134/JP/2021)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar