

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "A" BENCH

**Before: Shri Pramod M Jagtap, Vice President
And Shri T.R. Senthil Kumar, Judicial Member**

**ITA No. 09/Ahd/2019
Assessment Year 2010-11**

DCIT, Central Circle- 1(4), Ahmedabad (Appellant)	Vs	M/s. KGN Industries Ltd. A-504, Samudra Complex, Nr. Classic Gold Hostel, Opp. C.G. Road, Ahmedabd PAN No:AAACR9383G (Respondent)
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**Appellant by: Shri Shri Shramdeep Sinha, Sr. D.R.
Respondent by: None**

Date of hearing : 23-08-2022
Date of pronouncement : 07-09-2022

आदेश/ORDER

PER : T.R. SENTHIL KUMAR, JUDICIAL MEMBER:-

The present appeal has been filed by the Revenue against the order dated 17.10.2018 passed by the Commissioner of Income Tax (Appeals)-11, Ahmedabad quashing the penalty levied u/s. 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') relating to the Assessment Year (A.Y) 2010-11.

2. The brief facts of the case is that the assessee is a Limited Company engaged in Trading in Agro – Commodities. The department was in possession that During the previous year relevant to the Assessment Year 2010-11, the assessee received interest income of Rs. 7,58,122/- on which TDS of Rs. 1,16,814/- was deducted. However the assessee has not offered this income and not even filed the Return of Income for the relevant Assessment Year 2010-11. Therefore the case was reopened by issuing a notice u/s. 148 of the Act on 29.11.2013 which was duly served on the assessee. However the assessee did not file the Return of Income in response to the 148 notice. The assessee was issued with 142(1) notice and other notices, summons for 14th times between 17.07.2013 to 10.02.2015, in spite of proper service of notices, the assessee has not attended the hearing.

2.1. Only in the 15th hearing namely 12.03.2015 the Authorized Representative submitted the computation of total income for the Assessment Year 2010-11, along with the copy of balance sheet and Form No. 3CA and 3CD however Return of Income was not filed. After perusal of Balance Sheet, Tax Audit Report a show cause notice was issued on 12.03.2015, why the assessment proceedings not be completed invoking the provisions of Section 144 of the Act. The Assessee Representative submitted that due to financial difficulties and non-payment of self assessment tax, the company failed to file Return of Income.

2.1. Further one of the Director of the company was under judicial custody so that they failed to arrange the funds and Return of Income was not filed. On perusal of the Statement of Income and Tax Audit Report revealed during the assessment year, the assessee company has shown turnover of Rs. 62,19,74,159/- and other income of Rs. 1,29,97,313/- and profit of Rs. 1,59,18,716/- is derived before tax. The Assessing Officer made a disallowance of Rs. 1,86,710/- on account of Section 40(a)(ia) of the Act. Thus determined the assessed income as Rs. 1,68,10,620/- u/s. 144 r.w.s. 147 of the Act and also charged interest of u/s. 234A, 234B, 234C and 234D of the Act. The Assessing Officer also initiated penalty proceedings u/s. 271(1)(c) as the assessee company has concealed its income and has not offered the same for taxation and issued penalty notice u/s. 271B of the Act for not getting audited its books of account. The A.O. also issued penalty notice under 271F of the Act for not filing the Return of Income for the Assessment Year 2012-13 within the prescribed time limit u/s. 139(1) of the Act. The Ld. A.O. also levied minimum penalty u/s. 271(1)(c) of Rs. 57,13,930/- for the assessee willfully and deliberately concealed the income by not filing the Return of Income. Following the judgment of the Hon'ble Gujarat High Court in the Case of A.M. shah & Co. vs. CIT (2000) 108 Taxmann.com 137, in the case of CIT vs. Zoom Communication P. Ltd. reported in 191 Taxmann.com 179 (Delhi). The Hon'ble Apex Court judgment in the case of Mak Data Pvt. Ltd. vs. CIT-II in Civil Appeal No. 9772/ of 2013.

3. Aggrieved against the same, the assessee filed an appeal before the Ld. CIT(A). The Ld. CIT(A) deleted the penalty on the ground that the A.O. himself is not clear about the defaults committed by the assessee. There is no dispute that the assessee did not file the Return of Income and the A.O. accepted the income as shown by the assessee in the computation of income, except by making a minor additions of Rs. 1,86,710/- u/s. 14A of the Act. The Assessing Officer ought to have levied penalty u/s. 271F of the Act for non-filing of Return of Income. Thus the A.O. has erred in levied penalty u/s. 271(1)(c) for concealment of particulars of income thereby cancelled the same as follows:

6.1 The appellant contended that return of income was not filed for the reason that one of the main director of the appellant company was in jail and there was no money for payment of self assessment tax alongwith return of income. The appellant further contended that the AO accepted the income (except minor disallowance made u/s.14A) as shown by the appellant in the computation of income. Thus, the AO is legally unjustified in initiating and levying penalty u/s.271(1)(c) of the Act for concealment of income. For non filing of return of income, there are separate provisions of for initiating and levying penalty in the Act itself. The appellant further contended that the AO initiated penalty for concealment of income, however, in the penalty order, the AO has mentioned that the appellant has furnished inaccurate particulars of income and thereby concealed the true income. These findings clearly prove that the AO himself is not clear about the defaults committed by the appellant. The AR of the appellant cited several case laws in support of these contentions as mentioned in the submissions. Facts of the case have been carefully gone through. There is no dispute about the fact that the appellant did not file return of income and the AO accepted the income as shown by the appellant in the computation of income except minor additions u/s.14A of the Act. There are separate provisions in the Act u/s. 271F for non filing of return of income and penalty for non filing of return can be levied u/s.271F of the Act. The facts of the case show that this is not a case of concealment of income or furnishing inaccurate particulars of income which can be covered u/s. 271(1)(c) of the Act, hence, penalty levied by the AO u/s.271(1)(c) is not justified in this case. Moreover, it is a fact that the penalty was initiated for concealment of particulars of income whereas the AO has levied the penalty for furnishing inaccurate particulars of income, thereby concealed

particulars of income. These facts clearly prove that the AO has included one more default while passing the penalty order which was not at the time of initiating the penalty in the mind of the AO. There are several case laws of higher judicial authorities in which it has been held that if there is a difference in reasons for initiating the penalty and levying the penalty, penalty levied in such case cannot be held justified. Keeping in view these facts, the penalty levied by the AO is not found justified. Hence, it is deleted. This ground of appeal is allowed.

4. Aggrieved against the same, the Revenue is in appeal before us raising the Following Grounds of Appeal:

- 1. On the facts and in the circumstances of the case and in law, the 1.Ld. CIT(A) has erred in law and on facts in deleting the penalty of Rs.57,13,930/- u/s.271(1)(c) of the Act.*
- 2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in law and on facts in holding that no penalty could be levied u/s 271(1)(c) when the assessee had not filed his return return of income, and that this default attracted only penalty u/s 271F, whereas non-filing of return by itself demonstrates concealment of income.*
- 3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in law and on facts in holding that the Assessing Officer was not sure about the default for which penalty was to be imposed even though the penalty was initiated for concealed of income and imposed for concealment of income.*
- 4. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) ought to have upheld the order of the A.O.*
- 5. It is, therefore, prayed that the order of the Ld. CIT(A) be set aside and that of the A.O. be restored to the above extent.*

4.1. The Ld. Sr. D.R. Mr. Shramdeep Sinha submitted that as can be seen from the assessment order, the assessing officer has initiated penalty proceedings both u/s. 271(1)(c) for concealment of income and also issued penalty notice u/s. 271F for not filing the Return of Income. It is not the case that the Assessing officer has not initiated u/s. 271F proceedings in assessee's case. The

assessee is a limited company is found to not filed its Return of Income under section 139(1) of the Act and gets its books audited under 44AB of the Act. It is for this reason, the assessing officer issued 14 notices to the assessee from 17.07.2013 to 10.02.2015 calling upon the assessee to file its Return of Income. However the assessee has not chosen to respond the 14 notices issued by the Assessing Officer. The reason mentioned by the assessee that the Director of the company was under judicial custody so that it cannot arrange the funds for payment of self assessment tax and that is the reason for non filing the Return of Income is not an acceptable excuse given by the assessee. More particularly, when the assessee company has shown a turnover of Rs. 62,19,74,159 and other income of Rs. 1,29,97,313/- and profit of Rs. 1,59,18,716/- is declared by the assessee. Even during the assessment proceedings, the assessee submitted one Tax Audit Report and computation of Income has not filed the Return of Income. Therefore the Ld. A.O. was correct in initiating penalty proceedings u/s. 271(1)(c) for concealment of income by not filing the return of income. Thus the assessee is liable to be levy penalty within the meaning of Section 271(1)(c) read with Explanation 1 of the Act.

4.2. The Ld. D.R. further submitted that the ld. CIT(A) erred in holding that penalty u/s. 271F ought to have been invoked by the Assessing Officer. This is totally misconception of the facts in the assessee's case. Therefore prayed to restore the penalty order made by the Assessing Officer and allow the revenue's appeal.

5. None appeared on behalf of the assessee in today's hearing as well as in previous hearing date. It is seen from record, the original assessment order was passed is a best judgment assessment passed u/s. 144 read with 147 of the Act. During the penalty proceedings also, the assessee has not participated in the hearings on 25.03.2015 and 07.07.2015. The assessee being a Public Ltd. Company and having not filed the Return of Income for the assessment year 2010-11 and also not responded to 147 notice in spite of repeated opportunities. Therefore the Assessing Officer treated the entire income as concealed income and levied minimum penalty of Rs. 57,13,930/- within the meaning of Section 271(1)(c) read with Explanation 1 of the Act. However, the Ld. CIT(A) in his order held that the assessing officer ought to have invoked penalty provisions u/s. 271F for non filing of return of income. The case does not cover under 271(1)(c) either concealment of income or furnishing inaccurate particulars of the income. The ld. CIT(A) also further observed that penalty was initiated for concealment of particulars of income whereas the A.O. has levied penalty for "furnishing inaccurate particulars of income" thereby it is proved that the A.O. has committed a default while passing the penalty order and thereby deleted the penalty levied u/s. 271(1)(c) of the Act. The above observation of the Ld. CIT(A) is found to be not correct for the reason that in Para 5 of the penalty order, the A.O. has clearly mentioned that penalty proceedings for concealment of income initiated by way of issue of notice 274 r.w.s. 271(1)(c) of the Act. Similarly, in Para 9 of the penalty order, the assessing officer held that the assessee has willfully and deliberately concealed

income by not filing the Return of Income. Therefore the assessee is liable for penalty u/s. 271(1)(c) read with Explanation 1 of the Act. It is further noted in the assessment order, the assessing officer also initiated penalty proceedings under 271F of the Act as well as u/s. 271B of the Act for not getting the books audited. Thus the conclusion arrived by the Ld. CIT(A) is legally not correct and the same is hereby set aside and the penalty order passed u/s. 271(1)(c) by the Assessing Officer is hereby restored.

6. This view of ours is further supported by producing the penalty order dated 18.06.2015 passed u/s. 271F by the Assessing Officer wherein he has levied a penalty of Rs. 5,000/- for not filing the Return of Income as per the Section 139(1) of the Act. The Assessing officer also hereby dropped penalty initiated u/s. 271B of the Act by order dated 24.08.2015.

7. In the result, appeal filed by the Revenue is allowed.

Order pronounced in the open court on 07-09-2022

Sd/-
(PRAMOD M JAGTAP)
VICE PRESIDENT **True Copy**
Ahmedabad : Dated 07/09/2022

Sd/-
(T.R. SENTHIL KUMAR)
JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad

6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद