

IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH KOLKATA

आयकर अपीलीय अधीकरण, न्यायपीठ - “B” कोलकाता,

**BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.2627/Kol/2018
Assessment Year: 2011-12**

Deputy Commissioner of Income-tax, Central Circle- 1(1), Kolkata.	Vs.	M/s. Fortune Furnitech Pvt. Ltd. 6, Ashoka Chambers, 2 nd floor, Grastin Place, Kolkata- 700 001. (PAN: AAACF9440Q)
(Appellant)		(Respondent)

Present for:

Appellant by : Shri Sudipta Guha, CIT, DR

Respondent by : None

Date of Hearing : 31.08.2022

Date of Pronouncement : 12.09.2022

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal by the revenue is directed against the order of Ld. CIT(A)-20, Kolkata vide ITBA Appeal No. CIT(A), Kolkata-20/12489/2015-16 dated 03.10.2018 for A.Y. 2011-12 arising out of order passed u/s. 143(3) r.w.s 153A of the Income-tax Act, 1961 (hereinafter referred to as ‘the Act’) by DCIT, Central Circle-1(1), Kolkata dated 31.03.2015.

2. Grounds raised by the assessee are reproduced as under:

“1) For that the Ld. CIT(A)-20, Kolkata erred on facts as well as in law in deleting the penalty of Rs.1,85,40,000/- imposed u/s 271(1)(c) by holding that the statement recorded under section 132(4) during the search is a mere recorded statement and disclosure made therein cannot be undisclosed income.

2) For that the Ld. CIT(A) -20, Kolkata erred on facts as well as in law in holding that the disclosure of additional income of Rs.6,00,00,000/-, made by the assessee u/s 132(4) of the Act, does not represent undisclosed income, disregarding the undisputed fact that the disclosure have been made on the basis of incriminating materials found and seized during search.

3) For that the Ld. CIT (A)-20, Kolkata erred on facts as well as in law in holding that the disclosure of additional income was made obviously to cooperate with the department for making the search successful disregarding the facts that the assessee was under legal obligation to make the disclosure of additional income in the face of documents/materials found and seized..”

3. At the outset, we note that the matter has been listed for hearing for more than twenty times. Even today before us none appeared to represent the assessee. Department is represented by Shri Sudiptal Guha, CIT, DR. From the order sheet of the preceding date of hearing i.e. 22.07,2022, we note that notice for hearing was directed to serve through department. A report of the notice server of the Income Tax Department was placed on record according to which the notice server had gone to the address of the assessee to serve the notice but it was found that no such company in the name of the assessee existed at the said address. The notice was thus served through affixture. Notice for hearing has also been attempted to be served through registered post which has not been received back. Despite several notices issued to the assessee through registered post, assessee has failed to appear. All these facts are noted in the said order sheet as under:

“Notice of hearing for today was directed to be served through Department. A letter from the concerned Assessing Officer along with the report of the notice server of the Income Tax Department has been placed on file wherein the concerned notice server has reported that, as per the directions, I had gone to the address of the assessee to serve the notice. However, it was found that no such company named M/s Fortune Furnitech Pvt. Ltd. existed at the said address. Further that, he tried to enquire from the other people on 2nd Floor but no one could give any whereabouts of the company. Finally, the notice was served through affixation. There are signatures of two witnesses also on the said report. Notice for hearing was also attempted to be served through registered post to the assessee which has not been received back. Even on earlier dates also, the notices were issued to the assessee through registered post but the assessee failed to appear. Under the circumstances, the assessee/respondent is proceeded against ex parte. The ld. DR seeks time to call for assessment records so as to verify whether the assessee had offered additional income on the basis of incriminating material found during the search action or not. To come up for hearing on 31st August 2022.”

4. Accordingly, we are inclined to adjudicate upon the matter ex parte qua the assessee with the assistance of Ld. CIT, DR.

5. From the assessment order passed u/s. 143(3) read with section 153A of the Act dated 31.03.2015, we observe that Ld. AO has noted that *“it is seen from the computation of total income filed along with the return of income that the assessee company during the year under consideration had disclosed an order of Rs.6 Cr. as undisclosed business income which was duly included in the computation of total income. Penalty proceedings u/s. 271(1)(c) of the Income Tax Act, 1961 is initiated separately.”*

5.1. In the impugned penalty order dated 30.09.2015 passed u/s. 271(1)(c) read with section 274 of the Act, Ld. AO noted that a search and seizure operation u/s. 132 of the Act was conducted on 01.08.2012 at the office of the assessee being part of Theme Group of companies. Ld. AO further noted that assessee had filed original return u/s. 139(5) of the Act showing a loss of Rs.8,05,10,858/-. Subsequent to the search and seizure operation return was filed in response to notice issued u/s. 153A of the Act showing a loss of Rs.2,05,10,858/- which was assessed at Rs.2,04,65,858/-. In the course of penalty proceedings notices were issued on the assessee but none appeared nor any submissions were filed except for one written submission praying for dropping the penalty proceedings by giving reference to one decision in the case of Union of India Vs. Dharmendra Textiles Processors (2008) 306 ITR 277 (SC). By applying the provisions of Explanation 5A to section 271(1)(c) of the Act, Ld. AO levied penalty of Rs.1,85,40,000/- @ 100% of the tax sought to be evaded. Aggrieved, assessee went in appeal before the Ld. CIT(A).

6. From the perusal of the order of Ld. CIT(A), we note that before him also there was no attendance nor any response to the notice for hearing by the assessee . Ld. CIT(A) observed that *“I have gone through the respective impugned penalty orders and the respective appeal*

memorandums. They are adequate to decide the respective appeals. Thus, it will be passing all three appeals orders simultaneously by respective appeal orders.” From para 5 of the impugned order of Ld. CIT(A), wherein discussion and decision has been made, we note that reference has been made to Explanation 5A to section 271(1)(c) Ld. CIT(A) has drawn his conclusion to delete the penalty by holding neither clause (i) nor clause (ii) of Explanation 5A to section 271(1)(c) are attracted. The basis of arriving at such a decision of non-applicability of the said explanation is not discernible from the discussion made by the Ld. CIT(A). There are no evidence, nor any material or reference to any seized document which forms the basis to arrive at the decision taken by the Ld. CIT(A). The relevant observation made by the Ld. CIT(A) is reproduced as under:

“Firstly, and as is apparent from the impugned penalty order itself, this is not a case for clause (i). Even the inventory of assets found during the search - listed in the statement of facts - are nominal; and none could be surely said so as to relate to the appellant or to the appellant's business.

Now coming to the clause (ii) - just what is that 'income based on any entry' in any books of accounts or other documents or transactions? There is none. It is only the statement recorded u/s. 132(4) and being statement recorded during the course of the search, obviously the person/appellant was under stress/presume. It may be technically that u/s. 132(4) such statement may be used as evidence - but the statement has to be corroborated with tangible evidence; not wishful nor fanciful mentions; else the statement is but reduced to a mere statement only.

So - technically itself, neither clause (i) nor clause (ii) are attracted.

That is, section 271 r 1)(c) is not attracted.

5.2 That the appellant had adhered to his statement recorded u/s 132(4) and shown such additional income in its return of income filed u/s.153A - is a different matter. It is the appellant's own cooperation - to buy peace of mind. The additional income is but just a line mention in the computation of income.

And in any case - the assessed total income is still at Loss.

So again revisiting section 271(1)(c)-there is neither concealment of income, nor, furnishing of inaccurate particulars.”

7. Considering the grounds raised by the revenue on the deletion of penalty by the Ld. CIT(A), we find it proper, in the interest of justice and fair play to set aside the order of the Ld. CIT(A) which is not based on any evidence/material placed on record and remit the matter back to the file of Ld. CIT(A) to pass a speaking order after considering the relevant material and evidence, so also by calling a remand report in this respect from the Ld. AO and by giving a reasonable opportunity of being heard to the assessee in this respect. We also direct the assessee to be diligent in attending the appellate proceeding before the Ld. CIT(A) for its meritorious and expeditious disposal. Accordingly, the grounds taken by the revenue are allowed for statistical purposes.

8. In the result, the appeal of the revenue is allowed for statistical purposes.

Order is pronounced in the open court on 12th September, 2022.

Sd/-

(SANJAY GARG)
JUDICIAL MEMBER

Dated: 12.09.2022

Sd/-

(GIRISH AGRAWAL)
ACCOUNTANT MEMBER

JD, Sr. P.S.

Copy to:

1. The Appellant:
2. The Respondent:.
3. The CIT(A)-20, Kolkata
4. The CIT , Kolkata.
5. The DR, ITAT, Kolkata Bench, Kolkata

//True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata