

आयकर अपीलीय अधिकरण, रायपुर न्यायपीठ, रायपुर
IN THE INCOME TAX APPELLATE TRIBUNAL RAIPUR BENCH, RAIPUR
श्री रविश सूद, न्यायिक सदस्य एवं श्री अरुण खोड़पिया, लेखा सदस्य के समक्ष ।
BEFORE SHRI RAVISH SOOD, JM & SHRI ARUN KHODPIA, AM
आयकर अपील सं./ITA No.33/RPR/2018

(निर्धारण वर्ष / Assessment Year :2009-2010)

M/s Radhe Shyam Beni Shyam Kesary & Company, Dayalband, Nariyal Kothi, Bilaspur (C.G.)	Vs	ITO, Ward-1(2), Bilaspur
PAN No. : AAHFR 1307 G		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारित की ओर से /Assessee by	:	Shri Nitish Tiwari & Mrs. Summedha Tiwari, Advocates
राजस्व की ओर से /Revenue by	:	Shri G.N.Singh, Sr. DR
सुनवाई की तारीख / Date of Hearing	:	04/08/2022
घोषणा की तारीख/Date of Pronouncement	:	17/10/2022

आदेश / O R D E R

Per Arun Khodpia, AM :

This appeal is filed by the assessee against the order passed by the CIT(A), Bilaspur, dated 09.03.2016 for the assessment year 2009-2010 on the following grounds :-

- 1) *That the C.I.T. Appeals Bilaspur erred in conformed penalty u/s 271 D Rs.200000/-on the appellant arbitrary against the natural justice.*
- 2) *That appellants filed appeal lately because accountant of the firm had misplaced the appeal order hence appeal could not be submitted in time but accountant has given affidavit for reason in delay , appeal may be accepted and delay may also be cone.*
- 3) *That appellants firm case CIT appeal has not accepted trade advance Rs.200000/- I.T.O. treated u/s 269SS and imposed penalty.*
- 4) *That appellant firm maintained books of account bill vouchers and A.O. has also accepted in assessment order in para of assessment order and it is wrong to say assessee firm does not maintained books of accounts.*
- 5) *That penalty order u/s 271 D may kindly be cancelled because it trade receipts and not loan transaction.*

- 6) *That assessment order of the firm mentioned assessment year 2008-2009 where as penalty order passed by I.T.O. and C.I.T. **Appeal** assessment year 2009-2010 and it is bed in law penalty may be cancelled.*

2. At the outset, we found that the appeal of the assessee is barred by limitation. In this regard, Id. AR has filed an affidavit stating the reasons for condonation of delay. Ld. Sr. DR did not object to condone the delay. Thus, we condone the delay in filing the present appeal and appeal is heard finally.

3. Brief facts of the case are that the assessee is engaged in the business of manufacturing and selling of cement hume pipe and cement product and filed its return of income on 30.09.2009 electronically declaring total income at Rs.2,04,950/-. Thereafter the AO completed the assessment determining total income of the assessee at Rs.2,41,230/-. Consequently a penalty of Rs.2,00,000/- u/s.271D of the Act has also been levied by the AO. Against the said penalty, the assessee preferred appeal before the CIT(A) and the CIT(A) dismissed the appeal of the assessee.

4. Now, the assessee is in further appeal before the Tribunal.

5. Ld. AR assessee has submitted written submissions in support of its arguments and reiterated the same during the course of hearing proceedings before us, same are extracted as under:-

Written Submission dated 09/06/2022

*Written submission of grounds of appeal in the case of
M/s Radhe Shyam Beni Shyam Kesary & Company Distt: Bilaspur
(C.G.)*

Appeal No. : ITA 33/RPR/2018

Date: 09/06/2022

Penalty u/s 271D

It is submitted as under: -

1) That the above named appellant is a firm and filed return on time. The CIT Appeal is imposed penalty for Rs.200000/- for Assessment year 2009-2010.

2) That in the assessment order of the ITO mentioned assessment year is 2008-2009 where as penalty order passed by I.T.O. and C.I.T. Appeal assessment year mentioned is 2009-2010. It is bad in law. Hence it is requested that penalty may kindly be omitted.

3) In the case of Umashankar Mishra vs Commissioner of Income Tax 1982 136 ITR 330 MP no valid notice was served to the assessee hence penalty levied to assessee was not valid. The copy of the order is enclosed herewith for your kind perusal and ready reference.

In view of above facts and circumstances, you are Requested to kindly omit the penalty levied by the CIT Appeal u/s 271D.

Written submission dated 04/08/2022

Written submission of grounds of appeal in the case of M/s Radhe Shyam Beni Shyam Kesary & Company Distt: Bilaspur (C.G.)

Appeal No. : ITA 33/RPR/2018 Date: 04/08/2022

Penalty u/s 271D

It is submitted as under: -

1) That the above named appellant is a firm and filed return on time. The CIT Appeal is imposed penalty for Rs.200000/- for Assessment year 2009-2010.

2) That in the audit report, the auditor has taken a trade advance of Rs. 200000/- from Mani Shankar Devangan for supply of RCC pipe material which has been wrongly mentioned as unsecured loan. The minor mistake in audit report by the Auditor or a long discussion on sec 269 SS does not permit or suggest to levy penalty on just imaginary grounds. The copy of Account statement is enclosed herewith.

3) That in the case law of Mr. Virat Hasmukhrai Khandher v/s ACIT Range -3 Surat. The Honourable Income Tax Appellate Tribunal-Ahmedabad heard the rival contention and material available on record however the auditor has treated the advance as unsecured loan. In this case the assessee has submitted the nature of transactions of assessee's business was found to be bona fide and not mala fide.

4) That in the result The Honourable ITAT said that the facts and circumstances of the case it is not a fit case to levy penalty u/s 271 D of the Act because the reasonable cause for making these transaction was established by the assessee. Hence the penalty in question is deleted. The copy of the order is enclosed herewith for your kind perusal and ready reference.

In view of above facts and circumstances, you are requested to kindly omit the penalty levied by the CIT Appeal u/s.271D.

6. On the other hand, Id. Sr. DR submitted before us that the penalty order issued by the Ld AO was just, reasonable and according to law. The penalty imposed was mandatory and thus in the facts and circumstances of the case Ld CIT(A) has rightly confirmed the penalty imposed by the Ld AO, thus the same deserves to be upheld.

7. We have heard the rival contentions and perused the material available before us.

8. Assessee's contention that valid notice was not served for the penalty proceedings initiated hence penalty levied was illegal. Reliance was placed on judgment in the case of Umashankar Mishra Vs CIT 1982 136 ITR 330 MP. On perusal of the said judgment wherein it was held that:

4. The first question for consideration is whether the Tribunal was right in holding that the notice issued to the assessee under [Section 271\(1\)\(a\)](#) of the Act was a valid notice. Now, the Tribunal has found that that notice was not signed by the ITO. [Section 282](#) of the Act provides that a notice under the Act may be served on the person named therein as if it were a summons issued by a court under the Code of Civil Procedure, 1908. Sub-rule (3) of Rule 1 of Order 5, CPC, provides that every summons shall be signed by the judge or such officer, as he appoints. In view of this provision, it must be held that the notice to show cause why penalty should not be levied issued by the ITO should have been signed by the ITO and the omission to do so invalidated the notice. [In B. K. Gooyee v. CIT](#) [1966] 62 ITR 109 (Cal), the question for consideration was whether the absence of the signature of the ITO on the notice under [Section 34](#) of the Indian I.T. Act, 1922, was a mere irregularity or a clerical mistake. Dealing with this question, Datta J. Observed as follows (p. 119):

"In the present case, there was more than a mere irregularity or a clerical mistake, for, in my view, a notice without the signature lacks an essential and/or an integral and/or an inseparable vital part or requirement of a notice under [Section 34](#), a notice the terms of which are a condition precedent to the assumption of jurisdiction by the Income-tax Officer. "It is notice with a body but without a soul. Hence, it is an invalid notice and consequently, equivalent to no notice."

5. We respectfully agree with the aforesaid observations. The Tribunal distinguished the decision in [1966] 62 ITR 109 on the ground that the provisions of [Section 292B](#) of the Act were introduced after that decision. But, that provision, in our opinion, is intended to ensure that an inconsequential technicality does not defeat justice. But, the signing of a notice under [Section 271\(1\)\(a\)](#) of the Act is not merely an inconsequential technicality. It is a requirement of the provisions of Order 5, Rule 1(3) of the CPC, which are applicable by virtue of [Section 282](#) of the Act. Under the circumstances, the provisions of [Section 292B](#) of the Act would not be attracted in the instant case and the Tribunal in our opinion, was not right in holding that the notice issued under [Section 271\(1\)\(a\)](#) of the Act was a valid notice in the eye of law.

9. In present case the notice was served on assessee, in response Shri R N Kashyap, accountant of the assessee was appeared before the AO and submitted the response. Question on validity of notice was not raised before the revenue authorities, No material based on which the validity of notice can be challenged was produced. Thus the ratio of the case relied upon by the assessee cannot be applied in the present case.

10. Another contention of the assessee, that, if a mistake was committed in the tax audit by wrongly mentioning the trade advances as unsecured loan, the transaction cannot be basis for levy of penalty u/s 271D of the Act. Reliance was placed on case law Virat Hasmukhrai Khandher V/s ACIT in ITA no 427/Ahd/2013 dated 01/02/2016, where in ITAT Ahmedabad had observed as under:-

2.1 We have heard the rival contentions and material available on record. We find that, during the course of assessment proceedings, the assessee has received unsecured loan in cash amounting to Rs.1,60,000/- from two persons namely Shri Utpal Shah and Smt. Sonal Shah as discussed above. The stand of the assessee has been that the assessee had share trading income alongwith brokerage and commission income. The books of accounts of the assessee were audited as per Section 44AB. In the Tax Audit Report, the CA had mentioned the cash loan from two relatives, i.e. Rs.60,000/- from Smt. Sonal U. Shah, who is sister of the assessee and Rs.1,00,000/- from Shri Utpal V. Shah who is brother-in-law of the assessee. The auditor has treated the advance of Rs.60,000/-

as loan and commission income of Rs.1,00,000/- in cash was also treated as loan in absence of confirmation at audit stage. On the basis of the audit report, the Assessing Officer levied penalty u/s 271D of Rs.4,87,000/-. In appeal, the same restricted to Rs.1,60,000/-. In this case, the assessee has submitted the nature of transactions of assessee's business was found to be bona fide one and not mala fide. Section 273B clearly lays down that the offences enter alia alongwith other similar offences mentioned under this Chapter do not attract penalty if defaulter proves that there was reasonable cause of failure. In the case on hand, the amounts have been received by the assessee from his close relatives. During the course of assessment, the assessee has explained that the amount of Rs.1,00,000/- received from Shri Utpal Shah was as income and not as loan. The confirmation of Shri Utpal Shah in this regard was also filed before the Assessing Officer during the course of assessment proceedings. The assessee was offered the same as income and it was a bona fide mistake of assessee in passing entries of income against the cash received. With regard to Rs.60,000/- received by the assessee from his sister Smt, Sonal Shah, it was stated to be an advance from her purchase of shares/investment as the assessee was dealing in shares and securities. These facts were confirmed by his sister Smt. Sonal Shah during the assessment proceedings before the Assessing Officer.

2.2 Under these facts and circumstances, in our opinion, it is not a fit case to levy penalty u/s 271D of the Act because the reasonable cause for making these transactions was established by the assessee. Hence, the penalty in question is deleted.

11. Application of the case decided by the coordinate bench of tribunal Ahmedabad are also not relevant in the present case, since in the said order it was explained by the assessee that the auditor of the assessee had committed a mistake by treating the advance and commission income as loan. To substantiate the contention assessee had submitted confirmations from the parties before the AO and it was shown that the income was offered to tax. Thus the mistake was considered as bona fide mistake. Another Advance which was from sister of the assessee for investing on her behalf thus cannot be treated as loan u/s 269SS. Explanation given by the assessee in present case before the AO that the

sum received were trade advance as a common practice of the trade. Two bills for supply dated 12.10.2012 and 22.01.2013 were produced before the AO. This submission and contention of the assessee were not accepted by Ld AO on the ground that assessee himself admitted before the AO in its written submission during the assessment u/s 143(2) that these were "loan taken", thus it was an afterthought.

12. Ld CIT(A) have dealt with issue in its entirety and observed as under:-

Ground No. 1 - *That the levy of penalty has highly improper unlawful and unjustified under the facts and circumstances of the case.*

Decision — *This is general in nature as facts and circumstances have been narrated by the Assessing Officer. The above table which I had reproduced from the penalty order of the AO, the assessee signed accepting the money from Shri Mani Shankar Dewangan from 01/09/2008 upto 07/02/2009 amounting to Rs.2,00,000/- in total. The bills and vouchers were produced dated 22/10/2012 and 22/01/2013 of Rs. 56,000/- and Rs. 1,44,000/- respectively. The last receipt is dated 07/02/2009 and the first bill is dated 22/10/2012 mere is a gap of three years and more than 8 months from the last amount received and roughly 47 month from the last receipt of cash. The facts clearly states that it is no# a trade advance and the gap shows that it is only an afterthought Books of accounts had not be produced before the AO during penalty proceedings and no representation or written submission had been made before the undersigned. In the facts and circumstances of the case, I find that the AO has acted in the justified manner within 4 comers of the law. The ground of appeal is dismissed. The penalty imposed is confirmed.*

Ground No. 2 - *That on merits also levy of penalty is highly improper unlawful and unjustified.*

Decision *- *On merits the AO had to take recourse to the written submission daring assessment proceedings as no books of accounts had been produced by the assessee and written submission was stated to be a trade receipt and in the feds and circumstances I have already upheld the action of the AO and on merits also vide notice dated 22/04/2013 which was attended by the accountant of the assessee on 20/09/2013, books of accounts were not produced, hence, the AO had seen the replied filed by the assessee in response to notice u/s 143(2) at point No. 3 that*

assessee had received loan from Shri Mani Shankar Dewangan during the year. The later claimed of the assessee that these were trade advances are only an afterthought as after lapse of three years and eight months and 47 months, the bills raised by the assessee cannot be accepted as genuine one. Hence, on merits the AO has acted in justifiable manner and after citing the section 296SS in detail relying on Samara Hotels Pvt -Ltd. 19 taxman.com impose the penalty. I do not find any infirmity in the action of the AO, the penalty imposed by the AO is hereby confirmed and ground of appeal is dismissed.

13. In backdrop of the aforesaid observations and discussion, we are of the considered opinion that the Ld CIT(A) had dealt with the issue lawfully and properly appreciated the facts of case, thus no infirmity has been noticed in the order of Ld CIT(A) and therefore we refrain ourselves to interfere with the same. Consequently ground no 1 to 6 of this appeal of the assessee are dismissed.

14. In the result, the appeal of assessee is dismissed.

Order pronounced in pursuance to Rule 34(4) of ITAT Rules, 1963 court on 17/10/ 2022.

Sd/-
(RAVISH SOOD)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(ARUN KHODPIA)

लेखा सदस्य / ACCOUNTANT MEMBER

रायपुर/Raipur; दिनांक Dated 17/10/2022

Prakash Kumar Mishra, Sr.P.S.

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

1. अपीलार्थी / The Appellant-
2. प्रत्यर्थी / The Respondent-
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, रायपुर/ DR, ITAT, Raipur
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

(Assistant Registrar)

आयकर अपीलीय अधिकरण, रायपुर/ITAT, Raipur