

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

**BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA Nos. 292 to 298/LKW/2020
Assessment Year: 2010-11 to 2016-17**

Shri Ashesh Agarwal 98, Ratan Lal Nagar, Kanpur-208022. (PAN: AFBPA6437M)	Vs.	Dy. Commissioner of Income- Tax, Central circle-1, Kanpur- 208002.
(Appellant)		(Respondent)

Present for:

Appellant by : Shri Rakesh Garg, Advocate
Respondent by : Shri Amit Nigam, DR

Date of Hearing : 30.11.2022
Date of Pronouncement : 26.12.2022

ORDER

PER BENCH:

All the above captioned appeals filed by assessee are against the respective orders of Ld. CIT(A), Kanpur-4, Kanpur all dated 07.08.2020 u/s 250(6) of the Income-tax Act, 1961 (hereinafter referred to as the “Act”) passed against the penalty orders by the DCIT, Central Circle-1, Kanpur u/s. 271(1)(b) of the Act all dated 30.03.2019. Since all the appeals relate to assessee belonging to one group called Rich Udyog Network and facts are identical, arising out of common order of Ld. CIT(A), we dispose of all the appeals by this consolidated order for the sake of convenience, taking ITA No. 292/LKW/2020 as the lead case and

the result of which will be applied *mutatis mutandis* in all the remaining appeals.

2. Assessee has taken as many as nine grounds in the appeal challenging the levy of penalty of Rs. 10,000/- u/s. 271(1)(b) of the Act for each of the seven years involved, respectively.

3. Brief facts of the case are that a survey u/s. 133A was carried out on 28.04.2015 at the office of Rich Udyog Network Ltd. and other concerns belonging to Rich Udyog Network group of Kanpur. The survey u/s. 133A of the Act was converted into search u/s. 132 of the Act. In the course of search, various incriminating documents/information relating to the assessee were also found and seized as noted by the Ld. AO in the order. In the course of assessment, Ld. AO found that accounts of the assessee were voluminous and complex and, therefore, referred the case of the assessee to Pr. CIT(C), Kanpur for seeking approval for conduct of special audit u/s. 142(2A) of the Act. Based on the approval of Ld. Pr. CIT(C), Kanpur, assessee was required to get its books of accounts audited by the Special Auditor and submit a report thereon within ninety days. Ld. AO issued notices u/s. 142(1) of the Act which were complied in part only. It is claimed that on 15.12.2017, Ld. A.R. of the assessee attended the hearing and produced books of account before the Ld. AO. Assessee further claimed that the said books of account were impounded by the Ld. AO without assigning any reason inasmuch as the said books were impounded in the course of assessment proceedings without any authority to do so u/s. 142(1) of the Act. Subsequently, Special Auditors also repeatedly stated before the Income Tax Department about the non-compliance by the assessee in the special audit proceedings for getting the accounts audited.

3.1. Owing to non-compliance by the assessee, Ld. AO issued show cause notice u/s. 144 of the Act dated 31.07.2018 against which assessee filed its reply on 07.08.2018. Ld. AO passed the assessment order on 24.08.2018 u/s. 144 r.w.s. 153A of the Act by making various additions. Thereafter, Ld. AO issued notice u/s. 271(1)(b) of the Act to show cause as to why a penalty should not be levied against which assessee filed its submission dated 26.09.2018 requesting the Ld. AO to keep the penalty proceeding in abeyance until the disposal of appeal filed before the Ld. CIT(A)-IV, Kanpur against the assessment order. Ld. AO without taking into cognizance of the request of keeping the penalty proceeding in abeyance, proceeded to complete the penalty proceeding by levying a penalty of Rs. 10,000/- u/s. 271(1)(b) of the Act. Aggrieved, assessee went in appeal before the Ld. CIT(A), who confirmed the action of the Ld. AO.

3.2. While dismissing the appeal of the assessee, Ld. CIT(A) stated in para 9.1, various principles which are relevant in penalty imposition and are extracted as under:

“9.1 Section 271(1)(b) of the Act lays down that if the Assessing officer, in the course of any proceeding under this Act, is satisfied that any person who has failed to comply with a direction under sub-section (2A) of section 142, he may direct that such person shall pay by way of penalty. Further, various principles which are relevant in penalty imposition are as under:

- (a) There is no room for bringing in the rules of criminal law.*
- (b) Reference to the absence of mens rea or failure of the Revenue to establish mens rea is entirely irrelevant.*
- (c) The onus was on the assessee to answer the charge of having failed to comply with the direction.*
- (d) Imposition of penalty under section 271(1)(b) is discretionary, is not correct. It is true that the words used in section 271 is “may direct”. The expression “may” in the context in which it has been used must be held to be mandatory.”*

4. Ld. CIT(A) laid emphasize on the requirement that onus is on the assessee to show that there is a reasonable cause as prescribed u/s. 273B of the Act to answer the charge of having failed to comply with the requirement posed by the Ld. AO in the assessment proceedings. While dismissing the appeal, Ld. CIT(A) noted that assessee had not discharged the onus that there existed reasonable cause for non-compliance of statutory requirements u/s. 142(2A) of the Act. Ld. CIT(A) also noted that imposition of penalty u/s. 271(1)(b) of the Act is not *qua* assessment and is not dependent upon the outcome of the assessment. He is of the view that the conduct of assessee shows that he is non-cooperative to the authorities and thus, dismissed the appeal of the assessee. Aggrieved, the assessee is in appeal before the Tribunal.

5. Before us Shri Rakesh Garg, Advocate represented the assessee and Shri Amit Nigam, CIT, DR represented the revenue.

6. Ld. Counsel for the assessee, at the outset, placed on record, copies of order sheet of the assessment proceeding to demonstrate the existence of reasonable cause which prevented the assessee in complying with the statutory requirements as required by the Ld. AO in the assessment proceedings vis-à-vis section 142(2A) of the Act. From the order sheet entry dated 15.12.2017, Ld. Counsel pointed out that Shri Rahul Kumar Mittal, Advocate/Ld. AR of the assessee, attended the hearing on that date and all the relevant ledgers for AYs. 2010-11 to 2016-17 were produced which were impounded by the Ld. AO in his presence. He thus, submitted that once the books of

account produced before the Ld. AO were impounded by the Ld. AO in the course of assessment proceeding, assessee was prevented from producing the same before the Special Auditor for the conduct of the special audit u/s. 142(2A) of the Act and fulfil the statutory requirements.

6.1. He strongly submitted that the allegation of the ld. AO that books of account have not been maintained and assessee has not got his accounts audited as required u/s. 142(2A) of the Act in the captioned assessment years are misconceived as borne out from the facts on record from the noting of the order sheet entries. Accordingly, Ld. Counsel submitted that there exists reasonable cause within the meaning of section 273B of the Act and, therefore, the penalty so imposed is ought to be deleted.

7. Per contra, Ld. CIT, DR placed reliance on the orders of the authorities below.

8. We have heard the rival contentions and have carefully gone through the material available on record and have given our thoughtful consideration to the submissions made before us. Before adverting on the issue, we appraise ourselves with the relevant provisions of law which are reproduced hereunder:

“271(1) If the Assessing officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner in the course of any proceedings under this Act, is satisfied that any person –

(a).....

(b) has failed to comply with a notice (under sub-section (2) of section 115WD or under sub-section (2) of section 115WE or) under sub-section (1) of section 142 or sub-section (2) of section 143 (or

fails to comply with a direction issued under sub-section (2A) of section 142) or...”

he may direct that such person shall pay by way of penalty

(i).....

*(ii) In the cases referred to in clause (b), in addition to tax, if any, payable by him a sum of ten thousand rupees for each such failure
.....*

8.1. Also, section 273B provides for penalty not to be imposed in certain cases. Section 273B is reproduced as under:

“273B. Penalty not to be imposed in certain cases.

Notwithstanding anything contained in the provisions of clause (b) of sub-section (1) of] section 271, section 271A, section 271B section 271BB,] section 271C, section 271D, section 271E, clause (c) or clause (d) of sub- section (1) or sub- section (2) of section 272A, sub- section (1) of section 272AA] or sub- section (1) of section 272BB or] clause (b) of subsection (1) or clause (b) or clause (c) of sub- section (2) of section 273, no penalty shall be imposable on the person or the assessee, as the case may be, for any failure referred to in the said provisions if he proves that there was reasonable cause for the said failure.]”

9. From the perusal of the above provisions of the Act, we note that where a reasonable cause exists with the assessee for the failure on his part to comply with the statutory requirement, penalty need not to be imposed. Before us, Ld. Counsel for the assessee, through the order sheet entries of the assessment proceedings, evidently demonstrated that relevant ledgers for all the years under consideration were impounded by the Ld. AO in the course of assessment itself which has prevented the assessee in making compliance to the requirements of the special auditors for getting the special audit u/s. 142A of the Act completed. We also note that the Ld. CIT(A) himself while noting down various principles relating to penalty imposition has stated in one of the points that onus was on the assessee to answer the charge of having failed to comply with the direction (extracted supra).

9.1. Ld. CI(A) also observed in para 9.2 that wordings of section 273B are explicit that a person who has failed to comply with the notice/direction must show reasonable cause for which onus is upon the assessee. We also take note of the observation made by the Ld. CIT(A) in respect of “reasonable cause” as mentioned in section 273B that “reasonable cause” as in law, *prima facie* meaning of reasonable with regards to those circumstances of which the actor, called on to act reasonably, knows or ought to know. Reasonable cause can be reasonably said to be a cause which prevents a man of average intelligence and ordinary prudence, acting under normal circumstances, without negligence or inaction or want of bonafide.

9.2. Reference is also made to the legal maxim ‘*impotentia excusat legam*’ and ‘*lex non cogit ad impossibilia*’ in this respect. When there is an invincible disability to perform mandatory part of the law that *impotentia excuset*. Law does not compel one to do that which one cannot possibly perform. Where the law creates a duty or charge and the party is disabled to perform it, without any default in him and has no remedy over it, there the law will, in general, excuse him. Therefore, when it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the person interested had no control, the circumstances will be taken as a valid excuse.

10. It is also pertinent to note that ideally an appeal arising from penalty order is to be decided after finalization of the quantum proceedings. This practice embargo is not applicable on the ld. Assessing Officer for visiting the assessee with penalty but after passing the penalty order, the Appellate

Authority, i.e. CIT(Appeals) or ITAT ought to have waited completion of the quantum proceeding at appellate level. However, after going through the record available before us, we deem it appropriate to adjudicate this appeal without getting ourselves influenced of the quantum proceedings pending before the Appellate Authority. The reason we assign for adopting such a course of action is the fact that order sheets of assessment proceedings placed before us evidently demonstrates existence of reasonable cause at the end of the assessee in terms of section 273B.

11. Considering the facts on record and entry in the order sheets of the assessment proceedings furnished by the Ld. Counsel, it is evidently demonstrated that there exists a reasonable cause within the meaning of section 273B of the Act which prevented the assessee in meeting the compliance requirement in respect of special audit u/s. 142(2A) of the Act. Assessee has discharged its onus to explain the existence of reasonable cause leading to impossibility of performance as discussed above in reference to the two legal maxims. Accordingly, we unhesitatingly direct the Ld. AO to delete the penalty imposed u/s. 271(1)(b) of the Act. Accordingly, all the appeals of the assessee are allowed. As we have allowed the appeal by considering the existence of reasonable cause within the meaning of section 273B of the Act, all the other grounds taken by the assessee are rendered academic for adjudication, in the given context, and hence, not adjudicated upon.

12. Since fact pattern are identical in all the other captioned appeals before us, our findings in ITA No. 292/LKW/2020 given

above applies *mutatis mutandis* to all these appeals which are also, accordingly allowed.

14. In the result, all the appeals of the assessee are allowed.

Order pronounced in the open Court on 26th December, 2022 as per the rules framed under Rule 34(4) of the Income Tax Appellate Tribunal Rules,

Sd/-

(Mahavir Singh)
Vice president

Sd/-

(Girish Agrawal)
Accountant Member

Dated: 26th December, 2022.

JD, Sr. P.S.

Copy to:

1. The Appellant:
 2. The Respondent:.
 3. CIT(A), Kanpur-4, Kanpur
 4. CIT, Kanpur
 5. DR, ITAT, Lucknow Bench, Lucknow
 6. Guard file.
- //True Copy//

By Order

Assistant Registrar
ITAT, Lucknow Benches, Lucknow