

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT  
BEFORE SHRI PAWAN SINGH, JM & DR. A. L. SAINI, AM

आयकर अपील सं./ITA No.24/SRT/2022

निर्धारण वर्ष/Assessment Year: (2016-17)

(Virtual Court Hearing)

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| Akshar Gems,<br>3 <sup>rd</sup> Floor, Shreeji Diamond Apartment,<br>Nandu Doshi Ni Wadi, Vastadevdi Road,<br>Katargam, Surat – 395004 | Vs. | Assistant Commissioner of<br>Income-tax, Circle-3(2),<br>Aaykar Bhavan Nr.Majura<br>Gate, Opp. New Civil<br>Hospital, Surat-395001 |
| (Appellant)  |     | (Respondent)   |
| स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AARFA3697A  |     |  |

|                       |                          |
|-----------------------|--------------------------|
| Assessee by           | Shri Mehul Shah, CA      |
| Respondent by         | Shri Vinod Kumar, Sr. DR |
| Date of Hearing       | 27/12/2022               |
| Date of Pronouncement | 30/01/2023               |

**आदेश / O R D E R**

**PER DR. A. L. SAINI, AM:**

Captioned appeal filed by the assessee, pertaining to Assessment Year (AY) 2016-17, is directed against the order passed by the National Faceless Appeal Centre, (in short ‘the NFAC’)/Ld. CIT(A), Delhi, which in turn arises out of a penalty order passed by the Assessing Officer, under section 271-I of the Income Tax Act, 1961 (hereinafter referred to as “the Act”), dated 28.06.2019.

2. The grounds of appeal raised by the assessee are as follows:

*“1. On the facts and in the circumstances of the case, as well as law on the subject, the Learned Asst. Commissioner of Income Tax, Circle-3(2), Surat erred in imposing the penalty to the tune of Rs.9,00,000/- u/s. 271 – I of the Income Tax Act, 1961.*

*2. On the facts and in circumstances of the case, as well as law on the subject, The Learned CIT(A) NFAC Delhi erred in confirming the addition made by learned A.O.”*

3. Succinct facts are that during the assessment proceedings, the assessing officer noticed that assessee had carried out 41 transactions at different points of time to various importers. Out of these 41 transactions, in respect of 32

transactions made via Bank of India for making payments to the importer, and Forms No.15CB along with forms No.15CA were duly submitted to the bank authority i.e. Bank of India. However, in respect of the remaining 9 transactions made via ICICI Bank for making similar payments to the importer, the bank authority did not demand the copy of Form No.15CB and Form No.15CA and therefore the assessee had made the payments to the importer without the above forms. The assessee had thus failed to furnish information in Form No.15CB and Form No.15CA as required u/s 195(6) of the I.T. Act. Therefore, the assessee was asked to furnish the reply and explain the transactions.

4. In response, the assessee furnished its reply, which is reproduced below:

*"With reference to the above subject and in response to your show cause notice u/s. 274 r.w.s, 271-1 of the Income Tax Act dated 27.12.2018 to submit the reply, I undersigned humbly submit as under:*

*That the assessee firm during the year under consideration is engaged into the business of Imports, Exports and Manufacturing of Diamonds. The assessee firm does import of Rough as well as Cut & Polished Diamonds and as such during the year import of Rs.79,16,45,611/- was carried out for which the payment was also done. It is worthwhile to mention that while making the payments to the importers, the concerned authority of the bank had requested for filing of Form No. 15CB through the C.A. and as such the assessee firm had approached us for the issuance of said certificate in Form No.15CB.*

*Accordingly, the assessee firm has filed Form 15CA for the Imports payment made by it to the importers on the request of the bank. Thus, the assessee was under this impression that Form No. 15CA has been issued in all cases, however in some of the cases, as the bank didn't ask for the same, the assessee was under the impression that the same might not be required and hence Form No. 15CA were not issued in certain cases. Moreover, the assessee firm was under bona fide belief that the Form No.15CA is required to be submitted only if the payment is chargeable to Income Tax in India. In the case of the assessee firm the raw material was imported and hence there was no liability to deduct TDS as per the provisions of the Act.*

*It is worthwhile to mention that Section 195(6) has been amended during the year under consideration i.e. with effect from 01.06.2015 which is reproduced as given below:*

*'The person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum, whether or not chargeable under the provisions of this Act, shall furnish the information relating to payment of such sum, in such form and manner, as may be prescribed.'*

Prior to the above amendment the section 195(6) was as given below:

"The person referred to in sub section (1) shall furnish the information relating to payment of any sum in such form and manner as may be prescribed by the Board."

Sub Section (1) of Section 195 is given below:

"Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest [(not being interest referred to in section 194LB or section 194LC)] or [section 194LD] or **any other sum chargeable under the provisions of this Act** not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income tax thereon at the rates in force."

Thus, ongoing through the above it is quite clear that earlier, the said section was applicable only if the payments are chargeable to tax under the provisions of the Act and not otherwise.

Further, we would like to draw your kind attention to the rule framed for submission of Form 15CA i.e. Rule 37BB which is reproduced as given below:

Rule 37BB(1): "Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest or salary or any other sum chargeable to tax under the provision of the Act, shall furnish the following, namely:

(i) the information in Part A of the Form No. 15CA, if the amount of payment does not exceed fifty thousand rupees and the aggregate of such payments made during the financial year does not exceed two lakh fifty thousand rupees;

(ii) the information in Part B of the Form No. 15CA for payments other than the payments referred to in clause (i) after obtaining.

a. a certificate in Form 15CB from an accountant as defined in the Explanation below sub-section (2) of section 288; or

b. a certificate from the Assessing Officer under section 197; or

c. an order from the Assessing Officer under sub-section (2) or sub-section (3) 195.

(iii) On going through the above rule, it is clear that the information is required to be submitted under Rule 37BB only if the payments are chargeable to tax under the provisions of the Income Tax Act.

**Moreover, it may be noted that Rule 37 BB is not in line with the amended provision of Section 195(6). As per the present Rule 37BB, Form 15CA would be required only if the remittance is chargeable to tax. Hence, the CBDT had not prescribed anything for reporting in the case of payments to non-resident not liable to tax in India.**

In addition to above, it is worthwhile to mention that "When there are two possible interpretations of the Act, the one which is favourable to the assessee has to be preferred."

*The above ratio has been applied by the Hon'ble Supreme Court in the cases of CIT V. Podar Cement (P.) Ltd. 226ITR 625 and CIT V. Vegetable Products Ltd. 88 ITR 192*

*Further, the said Rule 37BB of the Income Tax Rules was amended by Finance Act 2016 w.e.f. 01.04.2016. The said amendment clearly specifies that the information in Form 15CA is not required for payments of Imports. Thus, the legislature has changed the rule immediately and hence the same is required to be taken into consideration as there was lot of hue and cry for the earlier provisions. Thus, the assessee cannot be treated as defaulter for the reasons mentioned above and looking to the case laws cited. In view of above, the assessee firm has not failed to furnish or furnished inaccurate information as per provision of section 195.*

*In addition to above, the notice issued u/s 274 r.w.s. 271-I does not specify whether the assessee firm has failed to furnish or furnishing inaccurate information u/s 195 of the Act, Thus, the notice issued 274 r.w.s. u/s.271-I is bad in law as it does not specify which limb of section 271-I of the Act.*

*In view of above, the penalty proceedings intended to be initiated by applying provision of section 271-I is bad in law and without jurisdiction and requires to be dropped in the interest of natural justice and oblige. "*

5. However, Assessing Officer rejected the contention of the assessee and held that assessee has committed a default by not furnishing the requisite form 15CA/certificate in 9 remittance before the AO in respect of foreign remittance and therefore, liable for levy of penalty u/s 271-I of the I.T. Act, and hence a penalty of Rs.9,00,000/- u/s 271-I of the I.T. Act, 1961 was imposed on the assessee.

6. Aggrieved by the order of Assessing Officer, the assessee carried the matter in appeal before the Id. CIT(A), who has confirmed the action of Assessing Officer. Aggrieved by the order of Id. CIT(A), the assessee is in further appeal before us.

7. Shri Mehul Shah, Learned Counsel for the assessee, argues that assessee had failed to file the necessary forms because the ICICI Bank had not demanded such forms, therefore it is the mistake committed by ICICI Bank and not the assessee. Besides, there is no loss to the revenue. The Learned Counsel for the assessee submitted that there was an amendment in section 195(6) of the Act, but there was no amendment in Rules, hence there was conflict between Act and Rules, thus the penalty imposed by the Assessing Officer is not valid. Thus,

there was amendment in the Act but Rules were not amended by the government, therefore the assessee was under genuine and *bona fide* belief, that he was not required to file Form No.15CB along with the Form No.15CA and this was the reasonable cause for not complying with the provisions of I.T. Act and therefore penalty should not be imposed on it in view of the provisions of section 273B of the Act.

8. On the other hand, Learned Departmental Representative (Ld. DR) for the Revenue submitted that there is no provision under section 271-1 of the Act regarding loss to the Revenue. Since a default by not furnishing the requisite form 15CA/certificate in 9 remittance before the Assessing Officer in respect of foreign remittance was committed by the assessee, therefore, liable for levy of penalty. The assessee has failed to substantiate its *bona fide* and therefore penalty should be imposed.

9. We have heard both the parties and carefully gone through the submissions put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the facts of the case including the findings of the ld. CIT(A) and other material brought on record. In order to adjudicate the issue under consideration, let us, first go through the relevant provisions of the Income Tax Act and Rules, which are reproduced below:

(a) Existing “ Sub-section 6 of Section 195” - Other sums” reads as under –

*“The person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum, **whether or not chargeable** under the provisions of this Act, shall furnish the information relating to payment of such sum, in such form and manner, as may be prescribed”.*

The above section 195(6) was substituted w.e.f 1.6.2015 by Finance Act 2015.Thus, section 195(6) was made applicable to all foreign payments w.e.f 1.6.2015.

(b) The Rule 37BB w.e.f 1.4.2016 (i.e. effective from AY 2017-18) is reproduced as under :

*“37BB. [Furnishing of information for payment to a non-resident, not being a company, or to a foreign company.*

*(1) The person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum chargeable under the provisions of the Act, shall furnish the following, namely:—*

*i) the information in Part A of Form No.15CA, if the amount of payment or the aggregate of such payments, as the case may be, made during the financial year does not exceed five lakh rupees;*

*ii) for payments other than the payments referred in clause (i), the information,—*

- a) in Part B of Form No.15CA after obtaining,—*
  - I. a certificate from the Assessing Officer under section 197; or*
  - II. an order from the Assessing Officer under sub-section (2) or sub-section (3) of section 195;*
- b) in Part C of Form No.15CA after obtaining a certificate in Form No. 15CB from an accountant as defined in the Explanation below sub-section (2) of section 288.*

*(2) The person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum which is not chargeable under the provisions of the Act, shall furnish the information in Part D of Form No.15CA.”*

10. We note that the earlier provisions of sub-section (6) of section 195 of the Act provided that the person referred to in section 195(1) of the Act shall furnish prescribed information under Rule 37BB in Form 15CA/15CB. Thus, earlier remitter was required to report foreign remittances in Form 15CA only in respect of payments chargeable to tax. Now the amended provisions of Section 195(6) made a reference to Rule 37BB however we note that Rule 37BB of the Rules was amended w.e.f 01.04.2016 and not 01.06.2015. Thus, ld Counsel contended that there was amendment in the Act, with effect from 01.06.2015, but Rule 37BB was amended w.e.f 01.04.2016, which is applicable from assessment year 2017-18 and not from the assessment year 2016-17 under consideration, therefore assessee was not supposed to follow the amended Rules, thus no penalty should be imposed on the assessee.

11. It is settled position of law that Article 265 of the Constitution of India lays down that, “No tax shall be levied or collected except by authority of law”. The Hon’ble Supreme Court of India has held that this provision under Article 265 of the Constitution of India is applicable not only for levy but also for the collection of taxes and the expression “assessment” within its compass covers both the aspects carried out by the executive functionary. Chottabhai Vs. Union of India 1962 SCR Supl.2 1006. Therefore, it is required that whole of the process of taxation must follow the procedures which are valid under the law and must adhere to law i.e. substantive one as well as procedural one too. Therefore, in other words it is provided in the Constitution of India that every step should be taken to ensure that levy and collection of the taxes is strictly in accordance with law – not only substantive one but the procedural law, as well. We note that in the assessee’s case under consideration, since the procedure is mentioned in Rule 37BB of the Rules which was amended w.e.f 01.04.2016, which is applicable from assessment year 2017-18, (not for assessment year 2016-17 under consideration) hence the penalty levied on the assessee is not justifiable and hence it should be deleted.

12. There is also no dispute to the legal proposition that penalty u/s 271-I of the Act is not mandatory but is discretionary and Assessing Officer has to exercise his judicial discretion before levying the penalty. The use of the word “**may**” in Section 271-I of the Act, clearly shows that discretion is conferred on the Assessing Officer to impose penalty or not to impose the penalty having due regard to the facts and circumstances of the case. Hon'ble Supreme Court in the case of Hindustan Steels – 83 ITR 26 (SC) observed that penalty will not be imposed merely because it was lawful to do so.

13. We also note that this is the first year of operation of section 271-I of the Act, (with effect from 01.06.2015, for A.Y. 2016-17), hence there is very less awareness among the taxpayers. Further as per the provisions of Section 273B of the Act, the penalty should not be imposed if the assessee proves the reasonable cause. The provisions of section 273B is reproduced below for ready reference:

**“273B. Penalty not to be imposed in certain cases-** *Notwithstanding anything contained in the provisions of..... [section 271-I,..... 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.”*

Thus, section 273B of the Act clearly states that no penalty shall be imposable on the assessee, for any failure referred to in certain provisions if he proves that there was reasonable cause for the said failure. The penalty provisions listed in section 273B includes penalty levied under Section 271-I of the Act. As the submitted that he was of the belief that no Form 15CA/ Form 15CB is to be furnished for import of raw material. The assessee firm was also under *bona fide* belief that Form No. 15CA is required to be submitted only if the payment is chargeable to Income Tax in India. In the case of the assessee firm, the Raw Material was imported and hence there was no liability to deduct TDS as per the provisions of the Act. Since there was amendment in the Act with effect from 01.06.2015 but no corresponding amendment was made in Rule 37BB of the Rules, and the assessee was of the *bona fide* belief that Form 15CA was not required during this operating period of 01.06.2015 to 31.03.2016. Based of these facts and circumstances, we delete the penalty.

14. In the result, appeal filed by the assessee is allowed.

Order pronounced on 30/01/2023 by placing the result on the Notice Board.

Sd/-  
(PAWAN SINGH)  
JUDICIAL MEMBER

सुरत /Surat

दिनांक/ Date: 30/01/2023

SAMANTA /Dkp Out Sourcing Sr.P.S

**Copy of the Order forwarded to**

1. The Assessee
2. The Respondent
3. The CIT(A)
4. CIT
5. DR/AR, ITAT, Surat
6. Guard File

Sd/-  
(Dr. A.L. SAINI)  
ACCOUNTANT MEMBER

By Order

// True Copy //

Senior Private Secretary/ Private Secretary /  
Assistant Registrar, ITAT, Surat