

IN THE INCOME TAX APPELLATE TRIBUNAL
RAJKOT BENCH, RAJKOT
(Conducted Through Virtual Court)

**Before: Shri Waseem Ahmed, Accountant Member
And Shri T.R. Senthil Kumar, Judicial Member**

**ITA Nos. 130 to 134/Rjt/2021
Assessment Year: 2016-17**

Shreenathji Developers 205 Centre One Apartment, Near Wockhart Hospital Kalawad Road-360005 Gujarat PAN No: ABTFS3052Q (Appellant)	Vs	The ITO, Ward- 2(1)(1), Rajkot (Respondent)
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**Assessee Represented: None (Written Submission filed)
Revenue Represented: Shri B.D. Gupta, Sr. D.R.**

Date of hearing : 01-03-2023
Date of pronouncement : 03-03-2023

आदेश/ORDER

PER BENCH:-

These five appeals are filed by the Assessee as against the separate Appellate orders dated 11.08.2021 passed by the Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, (in short referred to as "NFAC"), whereby confirming the levy of penalty under section 271(1)(b) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') relating to the Assessment

Year (A.Y) 2016-17. As common issue of Penalty u/s. 271(1)(b) is involved in all the five cases and facts are identical the same are disposed of by this common order.

2. The brief facts of the case is that the assessee is a Firm engaged in the business of construction activities. For the Assessment Year 2016-17, the assessee filed its Return of Income on 13.10.2016 declaring total income of Rs.13,870/-. The case was selected for scrutiny assessment and 142(1) notices were issued on various dates. However the assessee could not file the details immediately but filed the same belatedly since the Accountant of the Firm was away from the town for his personal work, which has resulted in not submitting the required details till the end of October, 2018. Though the assessee filed some details on 05.11.2018, 16.11.2018, 07.12.2018, 19.12.2018 and 20.12.2018, the same were not being considered by the Assessing Officer and made addition of Rs. 14,56,113/- being direct expenses which was not explained by the assessee. The A.O. further added a sum of Rs.40,00,000/- being unsecured loans not properly explained by the assessee. Thus the Assessing Officer determined the total income as Rs.54,69,983/- and also initiated penalty proceedings u/s. 271(1)(b) for not replying to the 142(1) notices.

3. In the penalty proceedings u/s. 271(1)(b), the assessee replied by way of written submissions that the details were not filed to the Assessing Officer because of non-availability of the Accountant. This explanation was not accepted by the Assessing Officer and

thereby levied a penalty of Rs. 10,000/- each for every default not replying to the 142(1) notices by the assessee. Thus the Ld. A.O. levied Rs. 50,000/- vide Penalty orders dated 07.06.2019 for each default committed by the assessee.

4. Aggrieved against the same, the assessee filed five appeals before Ld. CIT(A). The Ld. CIT(A) confirmed the levy of penalty that the assessee failed to furnish the details and the assessment is completed under best judgment assessment and following the various case laws upheld the levy of penalty u/s. 271(1)(b) of the Act. Thus the Ld. CIT(A) dismissed the appeals filed by the assessee.

5. Aggrieved against the same, the assessee is in appeal before us raising the following Grounds of Appeal:

1] The grounds raised in this appeal are without prejudice to one another.

2] The Ld. CIT[A] grievously erred in retaining the penalty of Rs.10,000/- levied by the Ld. A.O. On the facts and circumstances of the case it is respectfully submitted that penalty of Rs.10,000/- levied by the Ld. A.O. and retained by the Ld. CIT[A] ought to be deleted. This penalty is for the alleged default of hearing dtd. 14/06/2018.

3] This was for the reason that the accountant of the assessee who used to write the books from his home was out of Gujarat and the accounting material was with him. However, as and when he came to Rajkot the details were got prepared and were submitted to the Ld. A.O.

4] It is respectfully submitted that the assessee had applied for the adjournment of hearing of the case on various dates of Hearing but the order under appeal does not mention such adjournment asked for by the assessee, and therefore the penalty may kindly be ordered to be deleted.

5] It is respectfully submitted that the assessee had complied and e-filed written submissions as under and in view of that the subsequent compliance may kindly be considered that the earlier defaults have been condoned.

- [a] Dtd.05/11/2018 filed in response to notice of A.O.dtd.07/06/2018.*
- [b] Dtd.16/11/2018 filed in response to notice of A.O.dtd.12/11/2018.*
- [c] Dtd.07/12/2018 filed in response to notice of A.O.dtd.07/06/2018.*
- [d] Dtd. 19/12/2018 filed in response to notice of A.O.dtd.12/11/2018.*
- [e] Dtd.20/12/2018 filed in response to notice of A.O.dtd.12/11/2018.*

6)(a) The fact is that the assessee had complied to the various notices and filed voluminous submissions in the course of assessment proceedings and therefore the assessment order passed u/s.144 was not called for on the facts of the case and was not in accordance with law; as such, though the additions could be sustained this was not a case for assessment u/s.144. In respect of those details which the assessee could furnish in the course of assessment proceedings the same where such as were not in the control of the assessee and the same relates to unsecured loans. However, the assessee had furnished the PAN, confirmation, addresses etc. including bank statements of the depositors and if the Ld. A.O. wanted further details the same could have been obtained by exercising the powers vested with him.

6)(b) However, this was stated in the submissions made to the Ld. A.O. and such non-filing of the details though could attract addition could not justify assessment u/s.144 and in view of that as there was sufficient compliance on the part of the assessee the earlier defaults are deemed to have been condoned.

6)(c) It is respectfully submitted that the assessee has taken the ground in the quantum appeal filed in respect of order u/s.144 that the assessment order should not be passed u/s.144 and instead ought to have been passed u/s. 143(3). Though the additions made in the assessment order have been order to be deleted by the Ld. CIT(A), this ground not been decided or commented upon in the appeal order. However on the facts and circumstances of the case passing of the order u/s.144 was not in accordance with law.

7) The appeal filed by the assessee in the quantum matter has been allowed and the entire additions made in assessment u/s.144 have been deleted.

8) In view of the above the assessee respectfully submits that the penalty u/s.271[b] levied by the Ld. A.O. and retained by the Ld. CIT(A) may kindly be ordered to be deleted.

6. Aggrieved against the same, the assessee is in appeal before us raising as many as 8 grounds and requested to cancel the levy of penalty. None appeared on behalf of the assessee but a written

submission filed by the assessee is on record before us. In the written submission, which reads as follows:

5] It is respectfully submitted that the assessee had complied and e-filed written submissions as under and in view of that the subsequent compliance may kindly be considered that the earlier defaults have been condoned.

[a] Dtd.05/11/2018 filed in response to notice of A.O.dtd.07/06/2018.

[b] Dtd.16/11/2018 filed in response to notice of A.O.dtd.12/11/2018.

[c] Dtd.07/12/2018 filed in response to notice of A.O.dtd.07/06/2018.

[d] Dtd.19/12/2018 filed in response to notice of A.O.dtd.12/11/2018.

[e] Dtd.20/12/2018 filed in response to notice of A.O.dtd.12/11/2018.

6](a) The fact is that the assessee had complied to the various notices and filed voluminous submissions in the course of assessment proceedings and therefore the assessment order passed u/s.144 was not called for on the facts of the case and was not in accordance with Jaw; as such, though the additions could be sustained this was not a case for assessment u/s.144. In respect of those details which the assessee could furnish in the course of assessment proceedings the same where such as were not in the control of the assessee and the same relates to unsecured loans. However, the assessee had furnished the PAN, confirmation, addresses etc. including bank statements of the depositors, and if the Ld. A.O. wanted further details the same could have been obtained by exercising the powers vested with him.

6](b) However, this was stated in the submissions made to the Ld. A.O. and such non-filing of the details though could attract addition could not justify assessment u/s.144 and in view of that as there was sufficient compliance on the part of the assessee the earlier defaults are deemed to have been condoned.

6](c) It is respectfully submitted that the assessee has taken the ground in the quantum appeal filed in respect of order u/s.144 that the assessment order should not be passed u/s.144 and instead ought to have been passed u/s,143(3). Though the additions made in the assessment order have been order to be deleted by the Ld.CIT(A), this ground not been decided or commented upon in the appeal order. However on the facts and circumstances of the case passing of the order u/s.144 was not in accordance with law.

7] The appeal filed by the assessee in the quantum matter has been allowed and the entire additions made in assessment u/s.144 have been deleted.

8] In view of the above the assessee respectfully submits that the penalty u/s. 271[l][b] levied by the Ld. A.O. and retained by the Ld. CIT[A] may kindly be ordered to be deleted.

5. Per contra Ld. D.R. appearing for the Revenue submitted that though the assessee has not responded to the u/s. 142(1) notices, the assessee neither responded to the notices nor filed any

adjournment letter before the A.O. Therefore it is a clear cut case of levying penalty for non-compliance of the notice issued by the A.O. u/s. 271(1)(b) of the Act. However, the Ld. D.R. could not contravene the submissions and details filed by the assessee before completion of assessment.

6. We have given our thoughtful consideration and perused the materials available on record including the written submission filed by the assessee. It is an undisputed fact that the assessee though not complied to the 142(1) notices, however before completion of assessments, the assessee filed various details vide its letters dated 05.11.2018, 16.11.2018, 07.12.2018, 19.12.2018 and 20.12.2018. However submissions were not taken on record by the Assessing Officer and passed a best judgment assessment. Whereas when the assessee has filed so many details, the Assessing Officer ought not have passed the assessment order u/s. 144 of the Act, but ought to have passed the assessment order u/s. 143(3) of the Act. As stated by the assessee during the appellate proceedings, the entire additions made u/s. 144 assessment order is deleted by the Ld. CIT(A). Thus, the grievance made out by the assessee is found to be genuine and reasonable. In the above circumstances the levy of penalty under Section 271(1)(b) in our considered opinion is unwarranted. For better understanding Section 271(1)(b) and 273B are extracted below:

“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—

.....

(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 ;

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 271AA, section 271B, section 271BA, section 271BB, section 271C, section 271CA, section 271D, section 271E, section 271F, section 271FA, section 271FAB, section 271FB, section 271G, section 271GA, section 271GB, section 271H, section 271-I, section 271J, clause (c) or clause (d) of sub-section (1) or sub-section (2) of section 272A, sub-section (1) of section 272AA or section 272B or sub-section (1) or sub-section (1A) of section 272BB or sub-section (1) of section 272BBB or clause (b) of sub-section (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.”

7. A perusal of the above provisions makes it clear inasmuch as that levy of penalty is discretionary and not automatic. The said conclusion is further justified by Section 273B of the Act. A careful reading of Section 273B encompasses that certain penalties “shall” not be imposed in cases where “reasonable cause” is successfully pleaded. It is seen that penalty imposable under Section 271(1)(b) is also included one among the exclusions. By the said provisions, the Parliament has unambiguously made it clear that no penalty “shall be” imposed, if the assessee “proves that there was a reasonable cause for the said failure”. As noticed, if the statutory provision shows that the word “shall” has been used in Section 271(1)(b), then the imposition of penalty would have been mandatory. Section 273B as noted further throws light on the

legislative intent, as it specifically provides that no penalty “shall” be imposed, if the assessee proves “that there was reasonable cause for the said failure”.

8. For the above reasons we hold that the levy of penalty under Section 271(1)(b) are unjustified and therefore, the same are deleted.

9. In the result, all the five appeals filed by the assessee are hereby allowed.

Order pronounced in the open court on 03-03-2023

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER True Copy
Ahmedabad : Dated 03/03/2023

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,
राजकोट