

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH (SMC), SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No. 89/Srt/2023 (Assessment Year 2016-17)
(Physical hearing)

Atulkumar Babulal Modi, A-61, Link Complex, Link Road, Bharuch-392001. PAN No. ACWPM 4256 G	Vs.	I.T.O., Ward 1(2), Bharuch.
Appellant/ assessee		Respondent/ revenue

Assessee represented by	Shri Krutarth Desai, A.R.
Department represented by	Shri Vinod Kumar, Sr. DR
Date of Institution of appeal	03/02/2023
Date of hearing	17/03/2023
Date of pronouncement	21/03/2023

Order under Section 254(1) of Income Tax Act

PER: PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal by the assessee is directed against the order of learned National Faceless Appeal Centre, Delhi (NFAC)/Commissioner of Income Tax (Appeals), (in short, the Id. CIT(A)) dated 09/01/2023 for the Assessment year (AY) 2016-17 wherein the assessee has raised following grounds of appeal:

- “1. The impugned order has been passed without considering factual matrix of the case and applicable legal position. And therefore the same has to be quashed and set aside.*
- 2. It is submitted that the assessment order has been passed under Section 143(3) and not under 144. Therefore, it cannot be said that appellant was negligent in making submission to the notice.*
- 3. It was submitted before AO that appellant was new to the e-proceedings and therefore could not understand the proceedings of faceless assessment. The appellant has thereafter took the assistant of her authorised representative and accordingly made the submission. Therefore, the AO has ignored this*

submission and has passed the order imposing penalty which is deserved to be quashed and set aside.

4. *Appellant crave for leave to add or amend any other grounds of appeal."*

2. Brief facts of the case are that the case of assessee for A.Y. 2016-17 was re-opened under section 147. The assessing officer after issuing statutory notices under section 143(2) & 142(1) proceeded for completing assessment. The Assessing Officer noted that the notice dated 22/02/2022 and 04/03/2022 were issued and served upon the assessee but the assessee failed to comply with the notice. The Assessing Officer accordingly issued show cause notice dated 20/03/2022 under Section 274 r.w.s. 271(1)(b) of the Income Tax Act, 1961 (in short, the Act) for levy of penalty for non-compliance of two notices. The Assessing Officer recorded that the assessee had not responded to the said show cause notice. A fresh show cause notice dated 10/08/2022 was again issued. The assessee again not furnished any explanation. The Assessing Officer levied penalty of Rs. 10,000/- for each default thereby levied a penalty of Rs. 20,000/- vide his order dated 16/09/2022.
3. Aggrieved by the order of penalty, the assessee filed appeal before the Id. CIT(A). Before the Id. CIT(A), the assessee in the grounds of appeal, stated that the assessment order was passed under Section 143(3) and not under Section 144 of the Act, therefore, it cannot be said the assessee was negligent in making submission to the notices.
4. The Id. CIT(A) after considering the submission of assessee noted that he issued notice to the assessee vide notice dated 02/12/2022 for filing

his submission and document on or before 19/12/2022. The assessee filed response to such notice only on 17/12/2022 for making request of 15 days' time to furnish reply. Thereafter, the assessee has not filed any reply till passing of the order. The contention of the assessee that assessing officer ignored his submission and passed the penalty order, is not correct. The order of penalty clearly states the reasons for levying of penalty under Section 271(1)(b) of the Act. Notice dated 22/02/2022 and 04/03/2022 were issued and served upon the assessee. The assessee neither filed any document nor any explanation. On the statement of assessee that the assessment order was passed under Section 143(3) and not under Section 144 of the Act. The Id. CIT(A) on perusal of record, noted that the assessment order in this case was passed under Section 144 r.w.s 147 r.w.s. 144B of the Act on 20/03/2022. The assessee failed to prove the case against the penalty despite granting opportunity and upheld the penalty levied under Section 271(1)(b) of the Act. Further aggrieved, the assessee has filed the present appeal before the Tribunal.

5. I have heard the submissions of the learned Authorised Representative (Id. AR) of the assessee and the learned Senior Departmental Representative (Id. Sr. DR) for the Revenue and have gone through the orders of the lower authorities carefully. The Id. AR of the assessee submits that ultimately the assessment was completed under Section 143(3) in making addition by invoking provisions of Section 50C of the

Act. The assessee made the compliance by filing reply before assessing officer vide reply dated 25/12/2021 and only notice dated 20.02.22 and 04.03.22 was not complied. To support his submission, the Id. AR of the assessee relied upon the decision in DLF Commercial Enterprises Vs ACIT (2021) 131 taxmann.com 305 (Delhi Trib). On the ratio of decision that where the assessment order passed under Section 143(3) and not under Section 144, which means that the Assessing Officer had expressed satisfaction with the compliance made by assessee, therefore, levy of penalty under Section 271(1)(b) of the Act was not justified.

6. On the other hand, the Id. Sr. DR for the revenue submits that the assessee failed to show a reasonable cause about his non-compliance to notice dated 22/02/2022 and 04/03/2022 either before Assessing Officer in response to show cause notice under Section 274 r.w.s. 271(1)(b) or before the Id. CIT(A). Before the Id. CIT(A), the assessee did not respond nor filed any explanation or submission despite giving sufficient opportunity. The Id. CIT(A) in his order, specifically held that the assessment order in this case was passed under Section 144 r.w.s. 147 on 20/03/2022. The case law relied by the Id. AR of the assessee is not at all applicable on the facts of the present case. In the case law of DLF Commercial Enterprises Vs ACIT (supra), the assessment order was passed under Section 143(3) in accepting the return of income without any addition. However, in the present case, as admitted by the Id. AR

himself, the addition was made by invoking provisions of Section 50C of the Act. The assessee still failed to show any reasonable or sufficient cause for non-compliance of both the notices.

7. I have considered the submissions of both the parties and have gone through the orders of the lower authorities carefully. I find that the Assessing Officer levied penalty under Section 271(1)(b) for non-compliance of notices issued under Section 142 dated 22/02/2022 and 04/03/2022. The Assessing Officer levied such penalty for both the defaults by serving proper show cause notice which was again not responded. In the grounds of appeal before the Id. CIT(A), the assessee took a plea that the assessment order was ultimately passed under Section 143(3). Such contention of assessee was not accepted by the Id. CIT(A). The Id. CIT(A) held that the assessment order was passed under Section 144 r.w.s. 147/144B of the Act on 20/03/2022. Such fact is not controverted by the Id. AR of the assessee by filing assessment order. The filing of assessment order in order against the penalty under Section 271(1)(b) or 271(1)(c) is mandatory. The assessee has not filed copy of such assessment order despite issuing the defect memo. Even otherwise, it was the duty of assessee or his representative to place on record the copy of assessment order before taking the stand that the assessment was completed under Section 143(3) of the Act. The ratio of decision in the case law relied by the Id. AR of the assessee in DLF Commercial

Enterprises Vs ACIT (supra) is not applicable on the facts of the present case as the fact of the said case is at variance. In the said case, the assessment was completed in accepting the returned income. The assessment in the said case was completed under Section 143(3) by making subsequent compliance by the assessee. There is no evidence before me that the assessee made any subsequent compliance. Therefore, I do not find any merit in the grounds of appeal raised by the assessee and dismiss the same.

8. In the result, this appeal of this assessee is dismissed.

Order pronounced in the open court on 21st March, 2023.

**Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER**

Surat, Dated: 21/03/2023

**Ranjan*

Copy to:

1. Assessee –
2. Revenue --
3. CIT(A)
4. CIT
5. DR
6. Guard File

// TRUE COPY //

By order

Sr. Private Secretary, ITAT, Surat