आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"SMC" JAIPUR

डा॰ एस. सीतालक्ष्मी, न्यायिक सदस्य एवं श्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA. No. 382/JP/2022
निर्धारण वर्ष/Assessment Years : 2010-11

Dayaram Yadav Opp Road No. 4 VKI Area, Jaipur	बनाम Vs.	ITO WD 4(2), Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAEPY 2947 G		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri C. L. Yadav (C.A.) &
Shri Vikas Yadav (Adv.)
राजस्व की ओर से/ Revenue by : Smt Monisha Choudhary (Addl. CIT)

सुनवाई की तारीख/ Date of Hearing : 16/03/2023
उदघोषणा की तारीख/Date of Pronouncement : 28/03/2023

आदेश/ ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

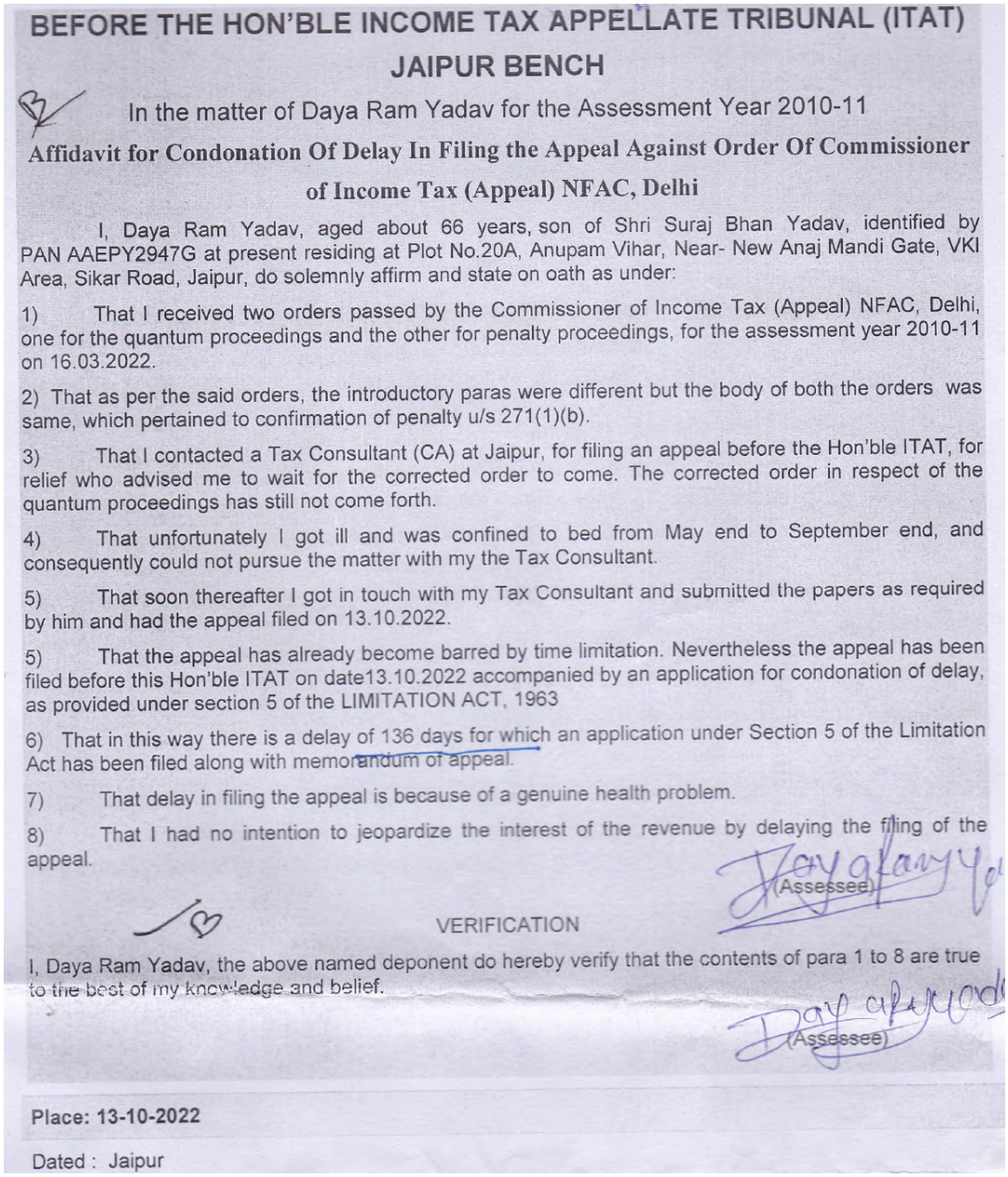
This appeal is filed by assessee and is arising out of the order of the National Faceless Appeal Centre, Delhi dated 16/03/2022 [here in after (NFAC)/ ld. CIT(A)] for assessment year 2010-11 which in turn arise from the three separate order of the penalty passed u/s. 271(1)(b) of the Act dated 22.05.2018 by Assessing Officer [here in after the ld. AO]. There were three

default of non-compliance as alleged by the ld. AO is dated 03.10.2017, 27.10.2015 & 10.11.2017.

2. At the outset of hearing, the Bench observed that there is delay of 153 days in filing of the appeal by the assessee for which the ld. AR of the assessee filed an application for condonation of delay with following prayers:

> "On 16.03.2022, I received the order of Commissioner (Appeals) NFAC, Delhi, in my case for assessment year 2010-11. Being aggrieved by the said order I requested Messrs C.L. Yadav & Associates, Chartered Accountants, to prefer an appeal to the Hon'ble Appellate Tribunal. They undertook to do the needful soon after the corrected order in quantum proceedings was received. But unfortunately, I got ill and the limitation for filling the appeal expired. My affidavit detailing the aforesaid facts is enclosed, which may kindly be placed before the Hon'ble Appellate Tribunal for condonation of the delay in submission of the appeal."

2.1 In addition to the petition so filed by the assessee he has supported his prayer with an affidavit duly swooned and executed by assessee wherein it has been contended that;



BEFORE THE HON'BLE INCOME TAX APPELLATE TRIBUNAL (ITAT)
JAIPUR BENCH

In the matter of Daya Ram Yadav for the Assessment Year 2010-11

Affidavit for Condonation Of Delay In Filing the Appeal Against Order Of Commissioner of Income Tax (Appeal) NFAC, Delhi

I, Daya Ram Yadav, aged about 66 years, son of Shri Suraj Bhan Yadav, identified by PAN AAEPY2947G at present residing at Plot No.20A, Anupam Vihar, Near- New Anaj Mandi Gate, VKI Area, Sikar Road, Jaipur, do solemnly affirm and state on oath as under:

1) That I received two orders passed by the Commissioner of Income Tax (Appeal) NFAC, Delhi, one for the quantum proceedings and the other for penalty proceedings, for the assessment year 2010-11 on 16.03.2022.

2) That as per the said orders, the introductory paras were different but the body of both the orders was same, which pertained to confirmation of penalty u/s 271(1)(b).

3) That I contacted a Tax Consultant (CA) at Jaipur, for filing an appeal before the Hon'ble ITAT, for relief who advised me to wait for the corrected order to come. The corrected order in respect of the quantum proceedings has still not come forth.

4) That unfortunately I got ill and was confined to bed from May end to September end, and consequently could not pursue the matter with my the Tax Consultant.

5) That soon thereafter I got in touch with my Tax Consultant and submitted the papers as required by him and had the appeal filed on 13.10.2022.

5) That the appeal has already become barred by time limitation. Nevertheless the appeal has been filed before this Hon'ble ITAT on date13.10.2022 accompanied by an application for condonation of delay, as provided under section 5 of the LIMITATION ACT, 1963

6) That in this way there is a delay of 136 days for which an application under Section 5 of the Limitation Act has been filed along with memorandum of appeal.

7) That delay in filing the appeal is because of a genuine health problem.

8) That I had no intention to jeopardize the interest of the revenue by delaying the filing of the appeal.

(Assessee)

VERIFICATION

I, Daya Ram Yadav, the above named deponent do hereby verify that the contents of para 1 to 8 are true to the best of my knowledge and belief.

(Assessee)

Place: 13-10-2022

Dated : Jaipur

2.2. Based on the stated facts in the petition and affidavit filed by the assessee it is noted as even confirmed by the registry that this present appeal is delayed by 153 days. For that matter of the delay the assessee submitted that he has received two orders one for quantum and one for penalty for the year under consideration. The

assessee submitted that the order for quantum and penalty were different but the body of both the orders were similar and were pertain to confirmation of penalty u/s. 271(1)(b). On receipt of the orders, he consulted a Chartered Accountant and was advised to wait till the corrected orders comes so as to decide which order is against which appeal and to deal with the connected finding in an appeal. In the meanwhile assessee failed ill and was advise to take rest and in that process the appeal was delayed by 136 days. Thus, there was no malafide of deliberate delay in filling the present appeal The ld. AR of the assessee submitted that the assessee has not gained anything and there is no prejudice caused to the department of present dispute as the assessee has merits of its case.

2.3 Per contra the ld. DR appearing on behalf of the revenue strongly objected to the condonation petition on reasons placed before the bench. The assessee is aware that the order has been passed against him and was taking the advice of professionals. Thus, assessee failed to file the appeal in time without reasonable cause and so, the assessee has no merits on this condonation petition and the appeal should not be entertained as the assessee failed to justify the delay in filling the present appeal. The affidavit

filed by the director has no support of any evidence to support the contention so raised.

3. We have heard the rival contentions and also persuaded the material available on record made available by both the parties. The bench noted that there is no dispute about the number of days delay by both the parties that this appeal is filed by the assessee after a delay of almost 153 days. There is also no dispute that under section 253(5) of the Act, the Tribunal may admit an appeal filed beyond the period of limitation where it is satisfied that there was sufficient cause on the part of the assessee for not presenting the appeal within the prescribed time. Section 253(5) deals the power of the tribunal and the same is reiterated here in below:

> Section 253
> (5) The Appellate Tribunal may admit an appeal or permit the filing of a memorandum of cross-objections after the expiry of the relevant period referred to in sub-section (3) or sub-section (4), if it is satisfied that there was sufficient cause for not presenting it within that period.

3.2 Thus, based on that provision tribunal may admit an appeal filed beyond the period of limitation where it is satisfied that there exists a sufficient cause on the part of the assessee for not presenting the appeal within the prescribed time. The explanation of the assessee therefore, becomes relevant to determine whether

the same reflects sufficient and reasonable case on its part in not presenting the present appeal within the prescribed time. In the present case, the assessee filed condonation petition supported by an affidavit stating that the facts to support the delay in bringing this appeal. The ld. AR thus prayed that the assessee should not be deprived of an adjudication on merits unless the Court of law or the Tribunal/Appellate finds that the litigant has deliberately and intentionally delayed filing of the appeal. There are various judgement on the issues that the explanation placed on affidavit was not contested nor we find that from such explanation, can we arrive at the conclusion the assessee was at fault, he intentionally and deliberately delayed the matter and has no bona fide or reasonable explanation for the delay in filing the proceedings and the position is quite otherwise.

3.3. In the case of Collector, Land Acquisition vs MST Katiji, the Hon'ble Supreme Court has held that the expression 'Sufficient Cause' employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner to sub-serves the ends of justice that being the life-purpose of the existence of the institution of Courts. It was further held by the Hon'ble Supreme Court that such liberal approach is adopted on one of the

principles that refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this, when delay is condoned, the highest that can happen is that a cause would be decided on merits after hearing the parties. Another principle laid down by the Hon'ble Supreme Court is that when substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay. It was also held by the Hon'ble Supreme Court that there is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of male fides. Similar view is taken by the apex court in the case of Improvement Trust, Ludhiana in civil appeal no. 2395 of 2008, wherein the court ruled that in the legal arena, an attempt should always be made to allow the matter to be contested on merits rather than to throw it on such technalities. The apex court further held that it is the duty of the court to see to it that justice should be done between the parties.

3.4 In light of above discussions and in the entirety of facts and circumstances of the case, we are of the considered view that the

assessee in his averments has made out a clear case that there was sufficient cause which being beyond his control, prevented him from filing the present appeal in time before the Tribunal. We find that there is no culpable negligence or malafide on the part of the assessee in delayed filing of the present appeal and he does not stand to benefit by resorting to such delay. Therefore, we find that there exists sufficient and reasonable cause for condoning the delay of 153 days in filing the present appeal and as held by the Hon'ble Supreme Court, where substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserved to be preferred. Therefore, in exercise of powers under section 253(5) of the Act, we hereby condone the delay of 153 days in filing the present appeal as we are satisfied that there was sufficient cause for not presenting the appeal within the prescribed time and the appeal is hereby admitted for adjudication on merits.

4. Now, coming to the merits of the case, as there were three orders, the three sperate appeals was required to be filed and even before CIT(A) also one appeal was filed. In response the ld. AR submitted at bar that online system for one default does not allow to file separate appeals for the same assessment year and

thus the single appeal was preferred before the ld. NFAC/CIT(A) based on the technicality. To support his view the ld. AR of the assessee showed us the copy of Form no. 35 filed where in the disputed amount is written as 30,000/- Since this is the fact even the appeal before tribunal is one but the amount written in Form no. 36 as Rs. 30,000/- being the amount disputed. This factual aspect not controverted even by ld. Sr. DR we admit the one appeal for each three separate defaults. In this appeal, the assessee has raised following grounds: -

> "1. That the order of the Learned CIT(NFAC) New Delhi is arbitrary, biased and bad in law and in facts and circumstances of the case in so far as it confirms levy of penalty under section 271(1)(b) by the Assessing Officer.
> 2. That the Learned CIT(Appeals) has grossly in confirming the levy of penalty under section 271 (1)(b) amounting to Rs. 30,000/- without appreciating the fact that the appellant had a reasonable cause.
> 3. That the Learned CIT(Appeals) has grossly erred in confirming the levy of penalty without the Assessing Officer having issued precise and specific notice for each default u/s 271 (1)(b) as envisaged in the provisions of the Act. That the appellant craves leave to add, alter or delete the above grounds of appeal at the time of hearing."

5. The fact as culled out from the records is that the AO was in possession of information that the assessee had received business receipts of Rs. 44,93,304/-, but the assessee did not file return of income u/s 139(1) of the Act for the assessment year under consideration. The AO issued notice u/s 133(6) of the Act which

was not complied by the assessee. Therefore, notice u/s 148 was issued after recording reasons and taking due approval and questionnaire u/s 142(1) was issued. Adequate opportunities were provided to the assessee by issuing notices u/s 142(1) dated 03.10.2017 fixing hearing for 13.10.2017, 27.10.2017 fixing hearing for 07.11.2017 and again on 10.11.2017 fixing hearing on 22.11.2017. However, no compliance was made on part of the assessee, therefore, the AO taking into account the continued non-compliance by the assessee in the course of the assessment proceedings completed the assessment u/s 147 r.w.s. 144 of the Act. Further penalty proceedings u/s 271(1)(b) of the Act was also initiated by the AO in the assessment order and consequent to these failures the AO has levied the penalty u/s. 271(1)(b) which is under dispute. The ld. AO passed all the order dated 22.05.2018.

6. Aggrieved from the order of levying the penalty assessee preferred an appeal before the ld. CIT(A). The appeal of the assessee was disposed off by the National Faceless Appeal Centre (NFAC) vide order dated 16.03.2022. The relevant finding of the ld. NFAC on the issue is reiterated here in below:

"5. Decision:
I have considered the assessment order passed u/s 147/ 144 of the Act and order u/s 271(1)(b) of the Act. Taking into account of the facts narrated above wherein assessee has not filed his return of income as stipulated u/s 139(1) of the Act and non-compliance during the assessment proceedings wherein the assessee has not complied with various notices issued on different dates, and the AO was compelled to pass the order u/s 147/144 of the Act. Further during the appeal proceedings the assessee has not complied with the notices mentioned in Para 4 above.

The basis of imposing the penalty by the AO is non-compliance of statutory notice by the appellant. The provision of Section 271(1)(b) is reproduced as under:

[Failure to furnish returns, comply with notices, concealment of Income, etc.]

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) 5656[***]

(b) has failed to comply with a notice 58 [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 59 [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-

1.64[**]

2. In the cases referred to in clause (b), 66 [in addition to tax, if any, payable] by him, 67 [a sum of ten thousand rupees] for each such failure:]

3……"

A bare perusal of above, makes it amply clear for levy of penalty for non-compliance with notice issued u/s 142(1). In the instant case the appellant was required to comply with the notices issued by the AO. The assessee did not comply to various notices issued u/s 142(1) of the Act. Further, during the penalty proceedings u/s 271(1)(b) the assessee only

stated for keeping the proceedings in abeyance as it is in appeal against the assessment order.

Even during the appeal proceedings the assessee failed to comply with the notices issued u/s 250 of the Act. Merely stating of the fact that due it has not received the notices and that it is in appeal against the assessment order does not help the cause of the assessee. It was duty of the appellant to participate in the assessment proceedings failure to which attracted penalty u/s 271(1)(b) of the Act. It is incumbent upon the assessee to participate in the appellate proceedings to substantiate its position. However, non-compliance before the AO and now in the appeal proceedings shows that assessee is not serious in presenting its case. Thus, it is clear that the appellant has failed to discharge his statutory obligations under the Income-tax Act. In such circumstances, the grounds of appeal are dismissed for want of non compliance by the appellant. The penalty so levied is hereby confirmed."

7. As the assessee did not find any favour against the appeal filed before NFAC, assessee has preferred this appeal before this tribunal. To support the grounds of appeal so raised by the assessee the ld. AR appearing on behalf of the assessee has placed their written submission which is extracted in below;

"The appellant respectfully begs to submit following facts and details for your honors kind consideration in support of grounds of appeal already submitted:

- Brief facts of the case: The appellant very humbly submits that the scrutiny assessment order u/s 144, as well as the penalty order u/s 271(1)(b), were passed by the Ld.AO on account of non-appearance of the appellant. It is pertinent to mention that none of the statutory notices were served on the assessee (Page no. 8-21 of the paper book) as the same were being sent on the earlier postal address of the assessee, which had been vacated by him. Thus, there being no proper service of the notices, the assessee did not even know of the proceedings going on against him. It is only on 22.11.2017 that he received a SCN for the first time, on the correct and proper address, in respect for completion of scrutiny assessment u/s 144 that he came to know of reassessment proceedings going on. On the very next day, he visited the office of the

AO and explained him the reasons for non compliance of notices being the sending of all earlier notices on the incorrect addresses, where upon he was informed that assessment in his case has been completed. Still, the Ld. AO imposed a penalty of Rs.10,000/- each u/s 271(1)(b), for non-compliance of notices on three occasions [aggregating Rs.30,000/-] which has been upheld by the Ld.CIT(A). Had the AO made effort to ascertain the correct address of the assessee earlier, which with due diligence could have been found out from the latest ITR available with him, the statutory notices would have got served at the proper address and assessment would have got completed u/s 143(3), saving the assessee from unnecessary harassment and litigation.

Submision before your Honour

1. Re: Ground No. 1 to 3: The Ld. CIT(A) has erred in confirming the penalty u/s 271(1)(b) imposed by the AO-

1.1 That consequent to issue of notice u/s 148, statutory notices u/s 142(1) were issued to the appellant on different dates (all of them on the incorrect address). It would be pertinent to mention that none of these notices were ever served on the assessee, as the notices were being issued on the incorrect postal addresses. This prevented the assessee from making any compliance. It is only on the afternoon of 22.11.2017, that the assessee straight away received a SCN dated 10.11.2017, fixing the date for hearing on 17.11.2017, at his present and correct postal address. The assessee approached the AO the very next day. He was informed that the assessment order has already been passed u/s 144 and he may file an appeal against it.

1.2 As a matter of fact, all statutory notices prior to the SCN referred to supra were being issued on the address - Daya Ram Yadav, E-546, Murlipura Scheme, Jaipur-302013, (Page no.- 8-17 of paper book) whereas the correct address of the assessee was - Daya Ram Yadav, P.No.20A, Anupam Vihar, Near New Anaj Mandi Gate, VKI Area, Sikar Road, Jaipur. There is no proof of service of any of the notices issued by the AO (Except the SCN dated 10.11.2017, which too was received after the date of compliance stated therein) (Page no.18-21 of paper book) So, there existed no reason on the part of the AO to form a belief that the assessee has without any reasonable cause failed to comply to the notices and impose a penalty u/s 271(1)(b).

1.3 During the quantum proceedings before the Ld.CIT(A), it was told that the assessee having changed his residence, did not get the statutory notices (Copy of submission to CIT(A) at page no.-1-7 of paper book) and affidavit in contention of the non service of the Notice u/s 148 r w s

147 and other statuary notices at (Page no.-34 of the paper book). The correct address could very well have been ascertained by the AO by looking in to the latest ITR which was available with him at the time of scrutiny proceedings. The Ld.CIT(A) did not even think it proper to enquire from the AO as regards service of the statutory notices, which forms the basis of imposition of penalty. He has erred in holding that the penalty u/s 271(1)(b) has been rightly levied by the AO.

1.4 As far as the issue of penalty u/s 271(1)(b) is concerned, from a perusal of the section 273B. it is understood that, notwithstanding anything contained in the provisions of clause (b) of Sub-section (1) of section 271, no penalty shall be imposed on the person or the assessee as the case may be, for any failure referred to in the said provision, if he proves that there was reasonable cause for the said failure. So it can be understood that penalty cannot be imposed, if the assessee is able to prove that there was reasonable cause for the said failure of not complying with the notice served on them. The meaning of reasonable cause has been discussed in the case of Woodward Governor India P. Ltd. Vs. CIT and Ors. 253 ITR 745 (Delhi). The relevant portion, as contained in Para 5 and 6, is reproduced below:-

"What would constitute reasonable cause cannot be laid down with precision. It would depend upon factual background and the scope is extremely limited and unless the conclusions are perverse based on conjectures or surmises and/ or have been arrived at without consideration of relevant material and/ or have been arrived at without consideration leave no scope for interference. Reasonable cause, as applied to human action is that which would constrain a person of average intelligence and ordinary prudence. The expression "reasonable" is not susceptible of a clear and precise definition; for an attempt to give a specific meaning to the word not space. It can be described as rational according to the dictates of reason and is not excessive or immoderate. The word "reasonable" has in law the prima facie meaning of reasonable with regard 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 produce, acting under normal circumstances, without negligence or inaction or want of bona fides."

In the case of Azadi Bachao Andolan v. Union of India 252 ITR 471 (Delhi), the Hon'ble High Court held as under:-

Section 273B starts with a non obstante clause and provides that notwithstanding anything contained in several provisions enumerated therein, 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 A clause beginning with "notwithstanding anything" is sometimes appended to a section in the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision of Act mentioned in the non obstante. A non obstante clause may be used as a legislative device, to modify the ambit of the provision of law mentioned in the non obstante clause, or to override it in specified. The true effect of the non obstante clause is that in spite of the provision or Act mentioned in the non obstante clause, the enactment following it will have its full operation or that the provisions embraced in the non obstante clause will not be an impediment for the operation of the enactment. Therefore, in order to bring in application of section 271(1)(b) in the backdrop of section 273B, absence of reasonable cause, existence of which has to be established by the assessee, is the sine qua non. Levy of penalty under section 271(1)(b) is not automatic Before levying penalty, the concerned officer is required to find out that even if there was any failure referred to in the concerned provision the same was without a reasonable cause The initial burden is on the assessee to show that there existed reasonable cause which was the reason for the failure referred to in the concerned provision. Thereafter, the officer dealing with the matter has to consider whether the explanation offered by the assessee or the person, as the case may be, as regards the reason for failure, was on account of reasonable cause. "Reasonable cause" as applied to human action is that which would constrain a person of average intelligence and ordinary prudence. It can be described as probable cause. It means an honest belief founded upon reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the person concerned, to come to the conclusion that the same was the right thing to do. The cause shown has to be considered and only if it is found to be frivolous, without substance or foundation, the prescribed consequences follow"

Reverting to the facts present case, it is submitted that owing to the non-service of statutory notices on the appellant, he could not make compliance which constituted a reasonable cause which would fall within the exception as provided in section 273B and, therefore under the

circumstances the penalty imposed under section 271 (1)(b) deserves to be deleted.

1.5 In Chandrawati Gupta v. ACIT (2017) S1 CCH 177 (Delhi)(Trib.) it was held that the assessee had disclosed reasonable cause for failure to comply with statutory notice and on same reasoning, CIT(A) should have cancelled penalty levied on assessee.

1.6 The assessee finally relies on the latest decision of this Hon'ble Bench in the case of Asha Yadav vs. ITO, Ward-1(3), Jaipur in ITA. No. 236/JP/2021 rendered on 04.04.2022, wherein under identical circumstances, the Bench has deleted the penalty. (Copy of order at page no.-24-30 of paper book)

1.7 It may be mentioned that the Ld.AO has nowhere mentioned in the assessment order or the order sheet the necessary statutory satisfaction u/s 271(1) of the I.T. Act that the assessee has failed to comply with the notices and the AO was satisfied to initiate the penalty proceedings. It is further submitted that a proposal to initiate penalty proceedings is not equivalent to recording a satisfaction which is the post failure and not with the preposition "if failed to". Therefore, it is stated that the penalty imposed is liable to be quashed as the issue is squarely covered by the following decisions.: - Hon'ble Karnataka High Court decision in the case of CIT & Ors. Vs. M/s Manjunatha Cotton and Ginnig Factory & Ors. (2013) 359 ITR 565- Apex Court decision in the case of CIT & Anr. Vs. M/s SSA's Emerald Meadows in CC No. 11485/2016 dated 05.8.2016. In absence of recording of the satisfaction in the assessment order, mere initiation of penalty will not confer jurisdiction on the AO to levy the penalty as held by the Delhi Tribunal in the case of Globus Infocom Ltd. Vs. DCIT (ITA

1.8 The appellant wishes to place reliance on the decision of ITAT Delhi in the case of Akhil Bhartiya Prathmik Shikshak Sangh Bhawan Trust vs ACIT 5 DTR 429 (Delhi Tribunal) wherein the Bench in paras 2.4 has held as under :-

2.4 Coming to the issue of recording of satisfaction, it may be mentioned that mere initiation of penalty does not amount to satisfaction as held by Hon'ble Delhi High Court in the case of CIT vs. Ram Commercial Enterprises Ltd. (2001) 167 CTR (Del) 321: (2000) 246 ITR 568 (Del). In absence of recording of the satisfaction in the assessment order, mere

initiation of penalty will not confer jurisdiction on the AO to levy the penalty.

1.9 Without prejudice to the submission made above, it may be mentioned that the penalty proceedings were initiated by issue of a notice u/s 274 r.w.s. 271(1)(b) dated 23.11.2017. It clearly mentioned the date of notice issued u/s 142(1) for the non-compliance of which penalty was being initiated, i.e.10.11.2017. So, when penalty proceedings for non-compliance of notice issued u/s 142(1) was initiated only in respect of notice dated 10.11.2017, imposition of penalty for non-compliance of notices on three occasions is illegal and invalid as held by a number of judicial forums.

1.10 Without prejudice to the above, it is submitted that penalty u/s 271(1)(b) could not be imposed for each and every notice issued under section 142(1) which remained not complied with on part of assessee, it should be imposed for first default only as held by Delhi F Bench in the case of Rekha Rani vs. DCIT, Central Circle-8, Delhi. The Hon'ble Bench in its decision pronounced by Shri G.C.Gupta, Vice President held that --

"5.We have considered the submissions of learned DR and have perused the order of the Assessing Officer and the learned CIT(A). we find that there was no reasonable cause on the part of the assessee for not appearing on the different dates of hearing before the Assessing Officer in response to notice issued under Section 143(2) of the Act. However, we find that the default is same and, therefore, penalty of Rs. 10,000/- could be imposed for the first default made by the assessee in this regard. The penalty under Section 271(1)(b) could not be imposed for each and every notice issued under Section 143(2), which remained not complied with on the part of the assessee. The provision of Section 271(1)(b) is of deterrent nature and not for earning revenue. Any other view taken shall lead to the imposition of penalty for any number of times (without limits) for the same default of not appearing in response to the notice issued under Section 143(2) of the Act This does not seem to be the intention of the legislature in enacting the provisions of Section 271(1)(b) of the Act. In case of failure of the assessee to comply with the notice under Section 143(2) of the Act, the remedy with the Assessing Officer lies with framing of "best judgement assessment" under the provisions of Section 144 of the Act and not to impose penalty under Section 271(1)(b) of the Act again and again. In this view of the matter, we restrict the penalty levied under Section 271(1)(b) of the Act to the first default of the assessee in not complying with the notice under

Section 143(2) of the Act. Accordingly, the penalty imposed is restricted to Rs. 10,000/- as against Rs 50,000/- confirmed by the learned CIT(A). The grounds of appeal of the assessee are thus partly allowed".

(Copy of order at Page No.- 31-33 of paper book)

In view of above facts and the case law relied upon, it is prayed that the appeal of the assessee may please be allowed and the penalty imposed u/s 271(1)(b) may kindly be deleted."

8. In addition to the written submission so filed the ld. AR of the assessee vehemently objected the finding of the ld. AO stating the notices were served to the assessee and fairly admitted that out of the three notices issued only notice dated 10.11.2017 was served to the assessee. It is only on the afternoon of 22.11.2017 that the assessee straight away received a show cause notice (SCN) dated 10.11.2017 fixing the date of hearing on 17.11.2017 at his present and correct postal address. The assessee approached next day but the assessment was completed u/s. 144. To support the fact that the notice dated 10.11.2017 was served to the assessee on 22.11.2017 he has served the proof of notice service at paper book page 21 where in post officer acknowledgment shows post dated 16.11.2017 and service date 22nd. Thus, he contended that in fact earlier two notices were not serviced and the third one served

when the compliance date expired and therefore, he cannot expect to comply the said notices.

9. The ld Sr. DR is heard who has relied on the findings of the lower authorities and also submitted that the assessee has not filed his ITR. The address was not correctly intimated and thus, she supported the orders and findings of the lower authorities.

10. We have considered the rival contention and perused the orders of the lower authorities and the material available on record arguments advanced by both the parties and gone through the judicial decision relied upon to drive home to the contentions so raised before us. The bench noted that the assessee has proved that the third notice was served after the compliance date and earlier two notices were received back unserved. The ld. DR did not controvert these factual aspects as contended by the ld. AR of the assessee by filling the relevant proof in the paper book filed. Thus, it is not in disputed that the impugned three notices upon which compliance was expected where in fact not served or if served the same is served after the date of compliance mentioned in the notice. As submitted by the ld. AR of the assessee that one

the notice is not served the relevant penalty levied has no leg to stand the same is required to be quashed. The ld. AR to support this view has relied upon the recent finding of this co-ordinate bench decision in the case of Asha Yadav bearing ITA No. 236/JP/2021. The relevant finding is reiterated here in below:

> 9.4 In our considered opinion, that the assessee was served with the notices issued by the AO which was not known by the assessee due to the change of addresses. Further considering the facts and circumstances of the case that the assessee had already furnished the current address in his letter dated 13.10.2021, the reasons explained by the assessee were bonafide and reasonable before the CIT (A) and which was not taken in consideration.

On being consistent to the view so taken we are of the considered view that in this case also the impugned three notice either not served and if served after the date of compliance and therefore, the levy of penalty on the said notices is not valid and hereby quash. Therefore, we direct the ld. AO to delete the penalty of Rs. 30,000/- levied. In terms of these observations the appeal filed by the assessee is allowed.

In the result, appeal of the assessee is allowed.

Order pronounced in the open Court on 28/03/2023

Sd/-	Sd/-
(डा॰ एस. सीतालक्ष्मी)	(राठोड कमलेश जयन्तभाई)
(Dr. S. Seethalakshmi)	(Rathod Kamlesh Jayantbhai)
न्यायिक सदस्य / Judcial Member	लेखा सदस्य / Accountant Member

जयपुर / Jaipur
दिनांक / Dated:- 28/03/2023
*Ganesh Kr.
आदेश की प्रतिलिपि अग्रेशित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Sh. Dayaram Yadav, Jaipur
2. प्रत्यर्थी / The Respondent- ITO, WD 4(2), Jaipur
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File { ITA No. 382/JP/2022}

आदेशानुसार / By order

सहायक पंजीकार / Asst. Registrar