

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
KOLKATA-GUWAHATI'e-COURT', KOLKATA  
[Virtual Court Hearing]**

**Before Shri Rajpal Yadav, Vice-President (KZ)  
&  
Dr. Manish Borad, Accountant Member**

**I.T.A. No. 33/GAU/2020  
Assessment Year: 2015-2016**

***Shri Dinesh Kumar Agarwal,..... Appellant  
MDP Bricks Industries,  
Jayanagar, Beltola,  
Guwahati-781 028  
[PAN:AFIPA0385D]***

***-Vs.-***

***Assistant Commissioner of Income Tax,....Respondent  
Circle-3, Guwahati,  
Aayakar Bhawan, Christian Basti,  
G.S.Road, Guwahati-781005, Assam***

**Appearances by:**

*No n e, appeared on behalf of the assessee*

*Shri Amit Kumar Pandey, JCIT, appeared on behalf of the  
Revenue*

Date of concluding the hearing : January 31, 2023

Date of pronouncing the order : March 30, 2023

**O R D E R**

**Per Rajpal Yadav, Vice-President (KZ):-**

The assessee is in appeal before the Tribunal against the order of Id. Commissioner of Income Tax (Appeals), Guwahati-2, Guwahati dated 27.11.2019 passed for A.Y. 2015-16.

2. Though the assessee has taken five grounds of appeal, but his grievances revolve around a single issue, namely ld. CIT(Appeals) has erred in confirming the penalty of Rs.1,65,780/- imposed by the ld. Assessing Officer under section 271(1)(c) of the Income Tax Act.

3. In response to the notice of hearing, the assessee has filed an application for adjournment. However, considering the facts of the case and repeated prayer for adjournment, we do not find it necessary to grant adjournment to the assessee. His application is rejected. We proceed to decide the appeal on merit.

4. A perusal of the impugned order of the ld. CIT(Appeals) would reveal that it is an *ex-parte* order. The ld. CIT(Appeals) has not decided the appeal on merit but dismissed for want of prosecution. Sub-section 6 of section 250 mandates the ld. CIT(Appeals) to formulate the points in dispute and thereafter record reasons on those points. The ld. CIT(Appeals) failed to adhere this mandatory procedure. Since it is a small penalty imposed upon the assessee, therefore, we do not deem it necessary to remit the issue to the file of ld. CIT(Appeals) for fresh adjudication.

5. We ourselves gone through the record carefully with the assistance of ld. D.R. and deem it appropriate to decide it like a

first appellate authority, because there is no finding of fact available in the impugned order. The brief facts are that the assessee has filed his return of income on 30.09.2015 showing total income of Rs.49,76,450/-. The assessment order was passed on 08.12.2017 determining the total income of the assessee at Rs.57,87,581/-. The ld. Assessing Officer was of the view that there is a discrepancy in the turnover disclosed by the assessee in the Income Tax Return vis-à-vis available as per Form No. 26AS. In this form, the gross turnover was shown by the contractee at Rs.3,09,15,820/-, whereas the assessee has shown it at Rs.2,69,38,693/-. There was a difference of Rs.39,77,127/-. The ld. Assessing Officer treated this difference as undisclosed turnover and estimated the profit equivalent to the rate disclosed by the assessee on the turnover of Rs.2.69 crores. The ld. Assessing Officer was of the view that the assessee has furnished inaccurate particulars of income. He issued a show-cause notice under section 271(1)(c) read with section 274. In response to this show-cause notice, the assessee has filed a written submission. This submission has been reproduced by the ld. Assessing Officer on pages no. 3 & 4 of the impugned order.

6. With the assistance of ld. D.R., we have gone through the record carefully and particularly the submission of the assessee reproduced in the penalty order. The assessee worked out how the difference has been reflected. He has demonstrated that the total difference was of Rs.41,41,440/-. This difference is, because the contractee has not made any payment during the period.

Hence it was not recognized by the assessee. The payments have been made in the next financial year and this income has duly been counted in the books in the next year. The assessee further submitted that there may be a difference of opinion about recognition of an item of income but how it is to be construed as concealment of income or filling of inaccurate particulars of income. A perusal of the penalty order would suggest that the ld. Assessing Officer has not recorded any categorical finding whether assessee has submitted inaccurate particulars of income or concealed the income. The ld. Assessing Officer has simply avoided all these mandatory factors of section 271(1)(c) by observing that assessee has evaded tax. It is the established position of law that ld. Assessing Officer has to demonstrate the charge against the assessee for which he wished to impose a penalty upon the assessee. A perusal of the assessment order would reveal that he initiated the penalty for concealment of income but no such finding is discernable in the penalty order.

7. Apart from the above, even on merit, no penalty is imposable upon the assessee because this computation of income resulting into higher income is only a difference of opinion. The assessee has given an explanation as to why this higher alleged income made by the ld. Assessing Officer was not disclosed by the assessee. This explanation was not found to be false because it has been offered in the next year. The assessee has already suffered double taxation on this estimation of profit on the alleged undisclosed receipts. In view of the above, the assessee

does not deserve to be visited with penalty under section 271(1)(c) of the Act. We allow the appeal of the assessee and delete the penalty.

**8. In the result, the appeal of the assessee is allowed.**

Order pronounced in the open Court on 30.03.2023.

<b>Sd/-</b> <b>(Manish Borad)</b> <b>Accountant Member</b> <b>Kolkata, the 30<sup>th</sup> day of March, 2023</b>	<b>Sd/-</b> <b>(Rajpal Yadav)</b> <b>Vice-President</b> <b>Kolkata, the 30<sup>th</sup> day of March, 2023</b>
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*Copies to :* (1) **Shri Dinesh Kumar Agarwal,**  
**MDP Bricks Industries,**  
**Jayanagar, Beltola,**  
**Guwahati-781 028**

(2) **Assistant Commissioner of Income Tax,**  
**Circle-3, Guwahati,**  
**Aayakar Bhawan, Christian Basti,**  
**G.S.Road, Guwahati-781005, Assam**

(3) *Commissioner of Income Tax (Appeals),*  
*Guwahati-2, Guwahati,*

(4) *Commissioner of Income Tax- ,*

(5) *The Departmental Representative*

(6) *Guard File*

*TRUE COPY*

*By order*

*Assistant Registrar,*  
*Income Tax Appellate Tribunal,*  
*Kolkata Benches, Kolkata*

**Laha/Sr. P.S.**