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

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री राठौड़ कमलेश जयंतभाई, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA No. 414/JP/2022
निर्धारण वर्ष/Assessment Years : 2012-13

Kalpana Jhala 3, Yudhister Marg, C-Scheme, Jaipur	बनाम Vs.	ITO Ward 5(4), Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ANFPJ 1258 F		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Sh. Mahendra Gargieya (Adv.) &
Sh. Devan Gargieya (Adv.)
राजस्व की ओर से/ Revenue by : Sh. Chanchal Meena (Addl. CIT)

सुनवाई की तारीख/ Date of Hearing : 28/03/2023
उदघोषणा की तारीख/Date of Pronouncement: 20/04/2023

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 27.09.2022 [here in after ld. NFAC/CIT(A)] for assessment year 2012-13 which in turn arise from the order dated 15.02.2022 passed under section 271(1)(b) of the Income Tax Act, 1961 [here in after to as Act] by the National Faceless Assessment Centre.

2. In this appeal, the assessee has raised following grounds: -

> "1. The impugned penalty order u/s 271(1)(b) dated 15.02.2022 is bad in law and on facts of the case, for want of jurisdiction and various other reasons and hence the same kindly be quashed.
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> 2. Rs. 10,000/-: The ld. CIT(A)/NFAC erred in law as well as on the facts of the case confirming the penalty imposed u/s 271(1)(b) of the Act. The penalty so imposed by the AO and confirmed by the ld. CIT(A)/NFAC, being totally contrary to the provisions of law and facts kindly be deleted in full.
>
> 3. The appellant prays your honour indulgence to add, amend or alter of or any of the grounds of the appeal on or before the date of hearing."

3. Succinctly, the fact as culled out from the assessment order is that as per information available on record, the above named assessee has invested Rs. 86,09,292/- in time deposit deposited cash of Rs.6,20,542/- in his bank account during the F.Y. 2011-12. To verify the transaction, notice under section 133(6) of the I.T. Act was issued to the assessee on 19.02.2019, however, no reply has been filed by the assessee. As per ITBA portal assessee has not filed his return of income for the A.Y. 2012-13. In this regard, Notice u/s 148 of I.T. Act, 1961 was issued on 25.03.2019 and served upon the address through speed post and registered AD after recording reasons and obtaining prior approval of the Pr. CIT-2, Jaipur. The assessee did not comply with the notice u/s 148.

3.1 In compliance to notice u/s 148, neither assessee submitted written submission in this office nor filed ITR. This case has been transferred through order u/s 127 of the IT Act. On change of incumbent notice u/s 142(1) with questionnaire was issued on 28.08.2019 through e-filing portal and speed post. The case was fixed for hearing on 04.09.2019 but the assessee was not complied with the same. On 04.09.2019 assessee filed written reply along with NRE bank account table of SBI. Further a letter issued to the assessee on 05.10.2019 for filing of information along with copy of passport and bank account. The case was fixed for hearing on 05.10.2019 but no reply filed by the assessee in support cash deposited and investment in time deposit. Further a show cause for non-compliance to notice u/s 142(1) issued on 06.11.2019 through speed post and ITBA portal for furnishing of required information as per query letter dated 28.08.2019. The case was fixed for hearing on 06.11.2019 but assessee has not complied with the same. Thus, based on these fact the assessment was completed u/s. 144 of the Act.

3.2 Since, there was an initiation of penalty u/s. 271(1)(b) in the assessment order the penalty order was heard without hearing to the

assessee and the relevant finding recorded by the NeFAC is reproduced here in below:

"1. Return of income filed by the assessee for the aforesaid AY was selected for scrutiny. Therefore, for the purpose of completion of assessment, during the assessment proceedings, notice u/s. 142(1) dated 19.11.2019. was issued to the assessee to submit it's submission with respect to the queries raised. In response to the notice u/s. 142(1), the assessee neither filed any response nor filed any request for adjournment.

2. Observing the non-compliance from the assessee, penalty proceedings u/s. 271(1)(b) of the IT Act, were initiated in this case by issuing notice cum show cause notice u/s. 274 r.w.s. 271(1)(b) requiring the assessee to explain as to why penalty should not be levied for non- compliance.

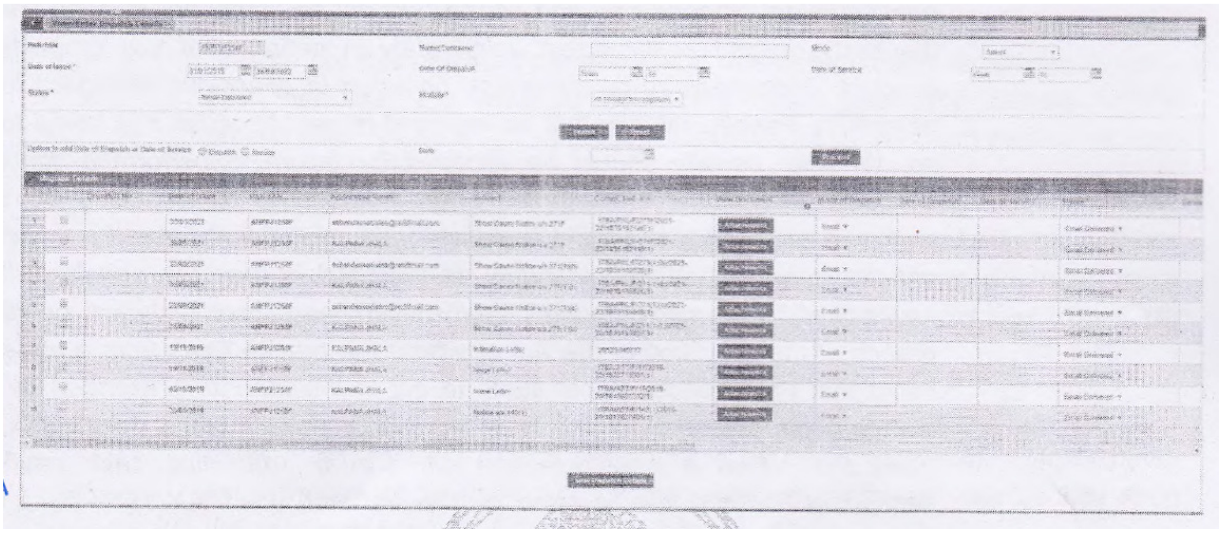
3. Later, after the introduction of Faceless Assessment Scheme, 2019, this case was assigned to ReFAC Unit. The show cause notices dated 30/8/2021 and 9/2/2022 were issued to the assessee to respond as to why the non compliance penalty should not be levied. However, no response was received from the assessee's side. Therefore it is presumed that assessee has no explanation to offer for its non-compliance. Hence, the case was marked to Verification Unit and the Notice was sent by the Verification Unit by the post id ER143843094IN. However, no response is received from the assessee.

4. Therefore, I am satisfied that the assessee has without reasonable cause failed to comply to the notice u/s 142(1) of the IT. Act. I therefore, hold that the assessee has failed to comply with the notice u/s 142(1) of the IT Act and committed default u/s 271(1)(b) of the I.T. Act, 1961 on one occasion. I, therefore, levy penalty u/s 271(1)(b) of the Income Tax Act, 1961 of Rs. 10,000/- (Rupees Ten thousand only).

4. Feeling aggrieved from the levy of the penalty order passed by NeFAC the assessee preferred an appeal before National Face Less Appeal Center (NFAC), New Delhi wherein also the appeal of the assessee was dismissed. The relevant finding of the ld. CIT(A) is reiterated here in below:

“5. The grounds of appeal, submissions of the appellant and the penalty order have been carefully considered. The grounds of appeal are related to the levy of penalty u/s 271(1)(b) of the Income Tax Act, 1961 (the Act). A.O. has levied penalty u/s 271(1)(b) of the Act amounting to Rs.10,000/- for non-compliance to the notice issued u/s 142(1) of the Act on 19.11.2019 during the assessment proceedings. A.O. has observed that during the assessment proceedings the assessee did not respond to the notice u/s 142(1) of the Act which led to the initiation of penalty proceedings. Further the assessee also did not respond to the show-cause notice issued. Hence as no explanation was filed in response to the show-cause notice issued the A.O. proceeded to levy penalty u/s 271(1)(b) of the Act for non-compliance to the notice u/s 142(1) of the Act.

5.1 During the appellate proceedings the assessee has disputed the penalty on grounds that she never received any of the notices and that service was not established. However it is admitted that notice u/s 142(1) was received by the tax consultant, "Further, in the assessment order u/s 147/144 of the Act, there is a mention of only one notice u/s 142(1) fixing date of hearing for 04.09.2019 was served, however, it was only a coincidence and not known how the same came in possession of the tax consultant, CA Shri Jugal (only tax return preparer). In this connection, on verification of ITBA system it is observed that the notices were sent on the email address registered with the department and were duly served. The screenshot is as under:-



5.2 In this regard, reference is made to the section 282 of the Income Tax Act, 1961, that deals with service of notices generally and it reads as under.

282. (1) The service of a notice or summon or requisition or order or any other communication under this Act (hereafter in this section referred to as "communication") may be made by delivering or transmitting a copy thereof, to the person therein named,-

(a) by post or by such courier services as may be approved by the Board, or

(b) in such manner as provided under the Code of Civil Procedure, 1908 (5 of 1908) for the purposes of service of summons; or
(c) in the form of any electronic record as provided in Chapter IV of the Information Technology Act, 2000 (21 of 2000): or
(d) by any other means of transmission of documents as provided by rules made by the Board in this behalf.

(2) The Board may make rules providing for the addresses (including the address for electronic mail or electronic mail message) to which the communication referred to in sub-section (1) may be delivered or transmitted to the person therein named.
Explanation-For the purposes of this section, the expressions "electronic mail" and "electronic mail message" shall have the meanings as assigned to them in Explanation to section 66A of the Information Technology Act, 2000 (21 of 2000).
Further, Clause (b) of sub-rule (2) of Rule 127 states the following
"For communications delivered or transmitted electronically-
1. email address available in the income-tax return furnished by the addressee to which the communication relates, or
2. the email address available in the last income-tax return furnished by the addressee, or
3. in the case of addressee being a company, email address of the company as available on the website of Ministry of Corporate Affairs; or
4. any email address made available by the addressee to the income-tax authority or any person authorised by such income-tax authority"
Thus as per section 282 of the Income Tax Act.1961 read with Rule 127 of the - Income Tax Rules, 1961, service of notice through email on the email address at available in return of income or last income tax return is a valid service On going through the penalty order it emerges that the notices have been issued online on ITBA with proper DIN and identification numbers. These notices are duly reflecting on the e-filing portal of the appellant as well as the department software ITBA. Thus the appellant's claim that the notices were never served is not correct.

5.3 It has been argued that the appellant was abroad hence she did not know about the service of notices and that she is ignorant of law. Reliance is placed on the decision of the Hon'ble Supreme Court in Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh [1979] 118 ITR 326. The decision is rendered in entirely context. The facts of the said case are totally different and deals with promissory estoppel as therein the appellant set up a sugar plant on assurances of Government for some subsidies and later on the Government had second thoughts about the same while the plant was being set up. The current case is routine one where the appellant was issued notices and did not respond to the same.

5.4 In this regard it is pointed out that "Ignorantia juris non-excusat is an established judicial maxim that ignorance of law cannot be claimed as an excuse for non-compliance with law. With the advent of technology and the department has proceeded towards e-notices and they are duly sent to the registered email address as well as are visible on the e-filing portal. An alert is also sent on the registered phone number. Thus there is no way that the communication can be overlooked. It is duty of citizens to effectively make use of these progressive and non-intrusive methods that have been brought in. Moreover email and e-filing portal can be accessed from anywhere in the world. Thus the assessee's plea of not service of notices is found to be incorrect and reasons advanced do not justify non-compliance to the notices. Hence it is held that the assessee has shown a negligent attitude which has led to the non-compliance, moreover the order has been passed u/s 144 on 19/11/2019 due to the non-compliance to the notice. Hence levy of penalty is justified and hereby upheld. Grounds of appeal are dismissed."

5. As the assessee not received any favour from the appeal filed before NFAC. The present appeal filed against the said order of the NFAC dated 27.09.2022 before this tribunal on the grounds as reiterated in para 2 above. The ld. AR appearing on behalf of the assessee has placed their written submission which is extracted in below;

> "The AO noted in the impugned penalty order that proceedings u/s 271(1)(b) was initiated and a Show cause notice dated 30.08.2021 & 09.02.2022 was issued, which was not complied with, the matter was the referred to verification unit but alleging also no response was received and hence the AO imposed penalty of Rs. 10,000/- alleging that there were non-compliances of the notices issued u/s 142(1). Hence this appeal.
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> Submission:
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> 1. Non service of notice: At the outset it cannot be denied that for a valid imposition of penalty, the AO has to first ensure a proper and valid service of notice upon the assessee and the assessee alone and then only, he can blame the assessee of non-compliance.
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> 2. There is no evidence (viz acknowledgement or receipt by the assesse) available with the department to prove a valid service of notices u/s 142 or even a service of notice u/s 148. There was no valid service even nor on any one authorized in this

regard. Even the presumption, if raised under the General Clauses Act, stands completely rebutted in these circumstances. Thus, it is evident from the face of the record itself that there was no service at all what to talk of a valid service.

3. Further, in the assessment order u/s 147/144 of the Act there is a mention of only one notice u/s 142(1) fixing date of hearing for 04.09.2019 was served, however, it was only a coincidence and not known how the same came in possession of the tax consultant, CA Shri Jugal (only tax return preparer). It is an admitted fact that the impugned notices were never served upon the assesse. Even the assessment was completed u/s 144 of the Act, Similarly, other penalty orders u/s 271(1)(c) dated 16.02.2022 and 271F dated 02.02.2022 were also passed ex-parte and was never served upon the assesse. Thus, the assessee was completely unknown from these developments. There was no communication even from the tax consultant perhaps for the reason that he was also lacking the information's (except on one occasion).

4. Moreover, it can be clearly seen from the penalty order that AO only emphasis on issue of notices on various dates but does not utter a single word on service of such notices neither brings out any evidence to prove that the notices issued were served to the assessee. Even while mentioning the fact that the matter was referred to the Verification Unit and the verification unit sent a post to the assessee, the AO did not mention the fact that the notice was served or not and declared that the assessee has failed to comply with any notice sent completely ignoring the part of service of such notices. Thus, the onus lay upon the AO to prove service remained undischarged.

The impugned notice by Verification unit was sent through Indian Postal Service but it is nowhere claimed that it was sent through registered AD only and therefore, the revenue could not have taken the benefit of the presumption raised u/s 27 of general Clauses Act, 1897. Such evidences were not confronted to the assesse.

5. It is also very important to note that the assessee is an NRI lady and has been residing outside India since 1988. She did not travel to India very frequently. After her last visit in Oct 2019, she did not come till today.

Thus, it is clear that the notices as claimed to have been served by the AO is nothing but a wrong factual statement in as much as the AO himself never knew that to whom the notices were served much less a valid service upon the assessee himself.

6. It is submitted that none of the notices were ever served upon the assessee or his family members. Therefore, there was no willful default made on the part of the assessee, who otherwise is a law abiding citizen, in non-compliance of the notices which were not served properly on the assessee and there exist reasonable cause.

7. Ignorance of law is a reasonable cause u/s 273B: Notices were not served upon the assessee. She seldom had any occasion to meet with such a situation. He did not understand much about complex tax matters, accounting or other related issues. It is a matter of common knowledge that in such cases otherwise also the assessee do not frequently consults with his CA / Consultant, in the cases of non-businessman salaried class employee and rather the villagers. The assessee therefore, proceeded without even knowing that there was some contravention at all (assuming it was so). Thus, there did exist a reasonable cause in terms of S. 273 B.Kindly refer Motilal Padampat Singhania 118 ITR 326(SC).

8. That the law is well settled that an order imposing penalty is a result of quasi-criminal proceeding and penalty should not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct, contumacious or dishonest or acted in conscious disregard of its obligation. No penalty should be imposed if the assessee was acting in honest and genuine belief in a particular manner as held by the Supreme Court in the case of Hindustan Steel Ltd. v/s State of Orissa (1972) 83 ITR 26 (SC), it was held that;
"*Penalty is not imposable if there is no conscious breach of law- An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceedings, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or guilty of conduct, contumacious or dishonest, or acted in conscious disregard to its obligation. Penalty will also not be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent t impose the penalty will be justified in refusing to impose penalty when there is a technical or venial breach of the provision of the Act or where the breach flows from a bonafide belief that the offender is not liable to act in the manner prescribed by the statute. It has been held in the case of Kanti Lal Purshottam & Co. 155 ITR 519 (Raj.) that when a new provision u/s 40A(3) prohibiting cash payment exceeding Rs.2500 was inserted for the first time w.e.f. AY 1969-70, it was held that the assessee was ignorant of such a prohibition being the very first year and hence disallowance made, were deleted."*

9. In the first appeal the ld. CIT(A) also confirmed the imposition of penalty however, a bare look upon the impugned order vis. a vis. the written submission reproduced in the impugned order clearly show that the submissions made, were not considered judiciously and even the ratio laid by the Hon'ble Apex Court was misunderstood. The ld. CIT(A) harped upon the point that the notices have been sent on the email/portal but ignored the pertinent fact that she was an NRI lady residing outside India since 1988 and since October 2019, she never came to India till date. Meaning thereby, she was not aware of the changed procedures w.r.t. the services of notices, order etc. A Citizen who is not in practice of the Tax Laws, would still continue to have presumption that service by the Department is always through a physical mode since inception and ignorance of such changes,

introduced only sometime back. Therefore, bonafide plea of ignorance of receipt of information through email/portal couldn't have been doubted. The Hon'ble Supreme Court in the case of Motilal Padampat Singhania 118 ITR 326(SC), held that there is no presumption that every citizen knows the law.

The principle of pre-ponderance of probability perfectly fit into the present case. It is well settled that the principle propounded by the Apex Court has to be seen but not the facts to be compared with a mathematical precision. At the same time, he ignored the decision in the case of Hindustan Steel Ltd. v/s State of Orissa (1972) 83 ITR 26 (SC). The claim of sending a physical copy of the notice also remains unanswered as to how the same was served and if yes, upon whom (whether on the assessee or any person authorizes by the assessee in this behalf). Unfortunately, the assessment order as also other penalty orders were also passed ex-parte and it is within the human probability that no person would like to face all the orders ex parte against it, more particularly, when the merits of case was so strong that it was a clear case of taxation of no income because the very addition made of Rs.92,29,834/- (time deposit of Rs.86,09,292/- and cash deposit of Rs.6,20,542/-), allegedly made in the bank account of the appellant during F.Y 2011-12, is absolutely an incorrect fact alleged by the AO in the assessment order (Page 4). The appellant lady who is aged years 56. has not been shown to be as not having been in the practice of checking her, email, she was not avoiding the notices with ulterior motive nor she was gaining any advantage by doing so. Therefore, mere allegation that it was *negligence attitude* is a mere allegation without any supporting material and clearly with an intension to penalize an assessee without considering the totality of facts & circumstances and the judicial guideline. It is not the question of the smallness of the penalty amount but it is a question where an innocent NRI person is being meant to suffer for something which was beyond her control. Hence, impugned penalty deserves a complete deletion and oblige.

The above submissions have been made on the facts narrated and instruction given by the client."

6. The ld DR is heard who has relied on the findings of the lower authorities and submitted that the assessee remained non-compliant even in the assessment proceeding and the assessee even though notice served remained non-compliant.

7. We have heard the rival contentions and perused the material placed on record. From the perusal of the assessment order, penalty order and order of the ld. CIT(A). We find that the **assessment order is dated 19.11.2019** whereas in the assessment order **notice issued u/s. 142(1) is mentioned as dated 28.08.2019**. Thus, the levy of penalty u/s. 271(1)(b) if any can be imposed it can be for the notice dated 28.08.2019. But we are surprised that in the order passed u/s. 271(1)(b) the date of non compliance is mentioned as 19.11.2019 [first para of the order] and even the ld. CIT(A) has confirmed the same date as of non compliance of notice. We find that the date mentioned in both the order as 19.11.2019 is the date of the order passed by the ld. AO u/s. 144 of the Act. Based on these set of facts when the charge of penalty is not clear upon of which date the order passed by the ld. CIT(A) and the ld. AO is gross violence of principles of natural justice and levy of penalty on a notice which has never been issued but in fact on that order was passed u/s. 144 of the Act and for which there is no levy of penalty u/s. 271(1)(b) of the Act. Based on these observations we vacate the levy of penalty of Rs. 10,000/-

In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 20/04/2023.

Sd/- Sd/-

(संदीप गोसाई) (राठौड कमलेश जयंतभाई)
(Sandeep Gosain) (Rathod Kamlesh Jayantbhai)
न्यायिक सदस्य/Judicial Member लेखा सदस्य/Accountant Member

जयपुर/Jaipur
दिनांक/Dated:- 20/04/2023
*Ganesh Kumar
आदेश की प्रतिलिपि अग्रेशित/Copy of the order forwarded to:

1. The Appellant- Kalpana Jhala, Jaipur
2. प्रत्यर्थी/ The Respondent- ITO, Ward 5(4), Jaipur
3. आयकर आयुक्त/ The ld CIT
4. आयकर आयुक्त(अपील)/The ld CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर/DR, ITAT, Jaipur
6. गार्ड फाईल/ Guard File (ITA No. 414/JP/2022)

आदेशानुसार/ By order,

सहायक पंजीकार/Asst. Registrar