

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E': NEW DELHI**

**BEFORE,
SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND
SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER**

**ITA No.126/Del/2021
(ASSESSMENT YEAR 2011-12)**

Mohd. Jawed C/o. PN Bhatia (Advocate) H. No./ 326, Civil Lines, 2 nd , Bijnor, Uttar Pradesh, PAN: AGEPJ9097Q	Vs.	ITO Ward-3(3) Bijnor, Uttar Pradesh
(Appellant)		(Respondent)

Appellant by	Sh. P. N. Bhatia, Advocate
Respondent by	Sh. S. L. Anuragi, Sr. DR

Date of Hearing	03/05/2023
Date of Pronouncement	11/05/2023

ORDER

PER YOGESH KUMAR U.S., JM:

This appeal is filed by the assessee for assessment year 2011-12 against the order of the Learned Commissioner of Income Tax (Appeals)-Moradabad order dated 13/09/2018.

2. The grounds taken in this appeal are as under:

“1. That Learned CIT(Appeal) has erred in law and facts confirming the imposition of penalty under the Income Tax Act 1961 amounting to Rs. 28000/- vide appeal no. 52HTO- 3(3)/BJR/17-18 DATED 13.09.2018 (Considering reassessed tax on reassessed income after appeal effect Rs. 27810/- instead of Rs. 11537/- tax on reassessed income).

2. The Learned CIT(Appeal) has not appreciated the facts that assessee neither furnished any inaccurate particulars of income or nor it was held that there was any concealment of income on the facts of the case nor any material was placed regarding filing of inaccurate particulars nor concealment of income so provision of section 271(l)(c) are not applicable.

3. That this vary fact was ignored by the learned CIT(Appeal), that penalty was imposed on the basis of estimate of income and so the estimated profit @8%. Income assessed was based on estimate basis. As Assessee's profit was Rs. 158520/- against Rs. 430010/- declared. In the order of assessment on account of low net profit (8% instead of 2.7% declared by the assessee), rejecting assessee plea, addition was made, merely as deemed addition as such. So penalty should not levied on the basis of deemed addition.

4. The Learned Commissioner of Income Tax (Appeal) has not considered the basic facts that penalty proceedings are separate and independent proceedings. But Learned Assessing Officer relied solely on the order of assessment is holy misconceived and misplaced in law, and as such the penalty order is liable to be quashed. That the order of the Learned CIT(Appeal) is un lawful and unjustified, penalty sustained is not according to law.

3. There is a delay of 798 days in filing the present appeal and the Ld. Counsel for the Assessee submitted that for the reasons stated in the Application for condonation of delay the delay in filing the Appeal may be condoned. The application filed by the Assessee for condoning the said delay of 798 days which reads as under:-

“Appeal is Time barred by 798 days : it is submitted as under that I filed Appeal for assessment year 2011-12 on 14.12.2018 and the Appeal Fee of Rs. 1500/- was also deposited in State Bank of India by me vide Challan No. 0001 on 17.11.2018 and sent through the Trackon courier services on 14,12.2018 vide Receipt no. 1368771591 and was delivered on 17.12.2018 as informed by the courier agency.

I am about 75 years of age and had .gone through two heart surgery and I was continuously confined to bed from December, 2018 to January 2020; and I was under the follow up of doctor and due to the spreading the Corona virus decease was effective all over India so my movement was not possible to verify the exact delivery position of courier and the courier agency always assured of delivery of the courier.

I came to know at last that Income Tax Appellate Tribunal is not accepting the appeal memo through courier so their remain no alternative except to file appeal request of condonation of delay,

I humbly request that I should not the punished for the fault of courier agency and as I was also not medically fit to take necessary action.

I have attached the copy of the original courier receipt dated 14.12.2018 and Copy of the Original Appeal Fee Challan dated 17.11.2018, it is verifiable from the certificate of the doctor about my medical condition.

It is therefore humbly requested that in view of above stated facts my assessee Mohd. Jawed must not be punished for my fault because of my medical condition, spreading of Corona virus disease and due to the fault of courier agency, I may be allowed condonation of delay for 798 days of appeal filed on 22.02.2021 vide Appeal No. ITA 1261 DEL / 2021 Assessment Year - 2011-12."

4. The Ld. DR on the other hand, contended that the said delay of 798 days is inordinate and the reasons assigned in the application are not sufficient to condone the delay. Therefore, submitted that the appeal has to be dismissed as the same is barred by limitation.

5. We have heard the parties and perused the material available on record.

6. The main contentions of the assessee for condoning the delay are that the assessee has paid fees of Rs.1,500/- and dispatched the entire appeal memo along with the fee Challan No. 001 dated 17/11/2018 which has been delivered the office of the Tribunal but the Appeal has not been registered by the Office of the Tribunal. Further contended that, the assessee is aged about 75 years had gone through two heart surgeries and was restricted to bed right from December 2018 to January, 2020 and thereafter due to corona situations the movement of the assessee was restricted and could not make follow up regarding the appeal sent by the Assessee. The Assessee has also enclosed courier receipt, original appeal fee Challan and the doctor certificate.

7. Considering the fact that the assessee is a senior citizen and taking treatment for his heart ailment and also considering the fact that the assessee had sent the appeal memo to the registry along with appeal fee on 14/12/2018 itself, though the filing of appeal is not permissible through the courier service, adopting liberal view by taking into consideration of the age and health conditions of the assessee, we deem it fit to condone the delay of 798 days in filing the present appeal. Accordingly, the delay of 798 days in filing the appeal is hereby condoned.

8. Brief facts of the case are that, assessment order u/s 147/144 was passed on total income of Rs. 16,85,210/- the penalty proceedings u/s 271 (1)(c) of the Act were initiated for furnishing inaccurate particulars of income and concealment of income. During the penalty proceedings, A.O. imposed penalty of Rs. 28,000/- vide order dated 20/10/2017. The order passed u/s 271(1)(c) dated 20/10/2017 has been challenged by the Assessee before the CIT(A), the Ld. CIT(A) vide order dated 22/01/2018 dismissed the appeal filed by the Assessee.

9. Aggrieved by the order passed by the CIT(A) dated 22/01/2018, the assessee preferred the present appeal on the grounds mentioned above. The Ld. Counsel for the Assessee brought to the notice of the Bench that the Assessee had preferred an Appeal against the assessment order dated 24/02/2016 before the CIT(A) wherein the Appeal has been partly allowed by the CIT(A) and upheld the addition of Rs. 4,30,010/- and the addition made

on account of cash deposit of Rs. 12,55,200/- has been deleted. The penalty proceedings has been initiated on the estimations worked out by the Department after giving appeal effect to the order of CIT(A). Therefore submitted that no penalty proceedings are maintainable on the estimated addition, thus the present Appeal deserves to be allowed.

10. On the other hand, the Ld. DR has not disputed the above facts but relied on the orders of the Lower Authorities and prayed for dismissal of the Appeal.

11. We have heard the parties perused the material available on record. As could be seen from the order of the CIT(A), the Ld. CIT(A) in the quantum Appeal filed by the assessee gave partly relief by sustaining addition determining the income on estimation basis in following manners:-

“The AO has not mentioned any investigation done by him during the remand proceedings or whether he has examined the accounts or not. In the assessment order, he has not only added the cash deposits but also has estimated the sales taking net profit @ 8%. He has given the following calculation for it:-

*i (Unexplained cash deposit with Punjab National Bank
Bearing account No. II03000100070764 Branch Gajraula*

Rs, 12,55,200/-

*Shiv Bijnor treated as income
u/s694 of / . I.T. Act 1961.*

ii Income from brick Kiln;

*Estimation of sales from brick Kiln Hindustan
Brick Works, Mandawar Sales tax deposited
Rs.268,756/- Sales tax Rate 5%*

Sales estimated. $100 \times 268756 / 5 = \text{Rs. } 53,75,120/-$

Proposed total income Rs. 4,30,010/-

Rs. 16,85,210/-

As the sales tax deposit was of Rs. 2,68,756/- at the rate of 5%. The total sales was of Rs. 75.120/- as per this calculation. The AO has calculated a reasonable 8% profit (net) on this rs which is Rs. 4,30,010/-, which takes care of the cash deposits (sale receipts). Thus while I hold the addition of Rs. 4,30,010/-, addition made on account of cash deposit of Rs. 4,30,010/- is deleted. The appellant had raised an additional ground of appeal regarding mated income of Rs. 4,30,000/- which is thus rejected.”

12. The Hon’ble Jurisdictional High Court in the case of CIT Vs. Aero Traders Pvt. Ltd. 322 ITR 316 has held that no penalty u/s 271(1)(c) of the Act can be imposed when the income is determined on estimate basis in following manners:-

“5. Against this order, the assessee filed an appeal before the CIT(A), who deleted the penalty imposed vide order dt. 7th Sept., 2007, holding that the addition made by the AO on the basis of estimated profit cannot be a subject-matter of penalty for concealment of income. The CIT(A) further found that penalty was not imposable in view of the substantial deduction given by the Tribunal and observed as under :

"I have considered the submissions of the assessee and perused the facts that are ruling in the instant case. There is no doubt that there are certain discrepancies noticed in the course of special audit as brought out in their report. However, such discrepancies by itself ipso facto lead to the conclusion that the

assessee has concealed the income. Ultimately the AO has to resort to estimated addition only. He could not point out any specific item of any addition with any conclusive evidence. Even the addition made by the AO on estimated basis is substantially reduced by the CIT(A) after considering the various facts and figures and circumstances of the case. The said action of the CIT(A) has become final consequent to the decision of the Hon'ble Tribunal in dismissing the Departmental appeal. Resultantly the income of Rs. 1,02,980 is on the basis of estimated profit rate only. It is not on account of any specific item of addition or disallowance. Such an addition made on the basis of guess work cannot be subjected matter of penalty for concealment of income. Penalty being a quasi criminal proceeding there is a duty cast on the AO to establish the guilt of the assessee in concealing the income or furnishing of inaccurate particulars of such income. As stated the seizure of the books of the police is not an act of the assessee. No motives can be attributed to the non-availability of books of accounts to examine and verify the various claims made by the appellant."

6. Aggrieved by this order, the Revenue filed an appeal before the Tribunal. The Tribunal, after hearing the submissions made on behalf of the Revenue, came to the conclusion that the CIT(A) had taken the correct decision in deleting the penalty. The operative portion of the impugned order dt. 4th Dec., 2008 is as follows :

"As the facts emerge the substantial quantum relief was given by the CIT(A) which has been confirmed by the Tribunal, the balance pertains to estimated rate of profit applied on the turnover of the assessee which in our view does not amount to concealment or furnishing inaccurate particulars. In our view,

the CIT(A) has taken right decision in deleting the penalty which is upheld.

7. The appeal is filed against the above-mentioned order of the Tribunal dt. 4th Dec., 2008. The finding arrived at by the Tribunal does not warrant interference from this Court as it is purely a finding of fact. No perversity has been pointed in such a finding. Consequently, no substantial question of law arises for consideration. As a result, the appeal is dismissed."

13. The Hon^{ble} Gujarat High Court in the case of CIT vs. Subhash Trading Company (Guj) on the same issue has held as follows:

"Where income is assessed on estimate basis after rejecting book results, penalty under s. 271(1)(c) cannot be imposed by mere application of Explanation thereof in the absence of any evidence to conclude a positive finding that there was concealment of income."

14. Similar view has been taken by the Hon^{ble} Punjab & Haryana High Court in the case of Harigopal Singh vs. CIT (supra) by observing as follows:

"Provisions of s. 271(1)(c) are not attracted to cases where income of an assessee is assessed on estimate basis and additions are made therein on that basis."

In view of the foregoing precedents of the Hon^{ble} Courts, it is apparent that when the bedrock of instant penalty is on the estimated addition, the same cannot be sustained.

15. Thus, considering the facts and circumstances of the case, we are of the considered view that, the additions were made/sustained by the CIT(A) on the basis of estimation and as discussed in the cases referred above, the penalty

cannot be levied on the basis of estimated additions and therefore, the Assessee cannot be subjected to levying penalty. Accordingly, we allow the Grounds of Appeal of the Assessee by setting aside the order of the Ld. CIT(Appeals) and thus the order of penalty stood deleted.

16. In the result, Appeal of the Assessee is Allowed.

Order pronounced in the Open Court on 11/05/2023

Sd/-

(ANIL CHATURVEDI)
ACCOUNTANT MEMBER

Sd/-

(YOGESH KUMAR U.S.)
JUDICIAL MEMBER

Dated: 11/05/2023

R.N, Sr. PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT, NEW DELHI