

IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH, MUMBAI

**BEFORE SHRI S RIFAUR RAHMAN, AM AND
MS. KAVITHA RAJAGOPAL, JM**

ITA No.705/Mum/2023
(Assessment Year: 2006-07)

Bina Silk Mills 1 st Floor, Behind Manisha Heights, Balrajeshwar Road, Mulund (W), Mumbai-400 080	Vs.	ITO 23(2)(1) Mumbai
PAN/GIR No. AABFB 8748 B		
(Appellant)	:	(Respondent)
Assessee by	:	Shri Satish R. Mody
Revenue by	:	Shri Chetan M Kacha
Date of Hearing	:	08.05.2023
Date of Pronouncement	:	10.05.2023

ORDER

Per Kavitha Rajagopal, J M:

This appeal has been filed by the assessee, challenging the order of the learned Commissioner of Income Tax (Appeals) ('Id.CIT(A) for short), National Faceless Appeal Centre ('NFAC' for short) u/s.250 of the Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Year ('A.Y.' for short) 2006-07.

2. The assessee has challenged the grounds of penalty amounting to Rs.26,27,628/- levied u/s. 271(1)(c) of the Act by the Assessing Officer (A.O. for short) and confirmed by the Id. CIT(A).

3. The brief facts are that the assessee filed its return of income dated 28.03.2008, declaring total loss of Rs.1,97,548/-. The assessee's case was reopened and the

assessment order was passed u/s. 143(3) r.w.s. 147 of the Act where the A.O. making the following additions/disallowances determined the total income at Rs.94,06,384/-:

1.	Unsecured loans considered as cash credits u/s. 68	Rs.46,05,000.00
2.	Disallowance u/s. 41(1)	Rs.16,00,000.00
3.	Short term capital gain on surrender of rights	Rs.1,90,000.00
4.	Short term capital gain u/s. 50	Rs.30,11,384.00

The A.O. also initiated the penalty proceedings u/s. 271(1)(c) of the Act and vide order dated 26.03.2012 levied penalty of Rs.26,27,628/- u/s. 271(1)(c) of the Act.

4. The assessee was in appeal before the Id. CIT(A) challenging the penalty levied u/s. 271(1)(c) of the Act.

5. The Id. CIT(A) vide an *ex parte* order dated 11.01.2023, confirmed the penalty for the reason that the assessee has not complied with the notices and has thereby failed to substantiate its stand before the first appellate authority.

6. The assessee is in appeal before us, challenging the impugned order of the Id. CIT(A).

7. The learned Authorized Representative (Id. AR for short) for the assessee contended that the Tribunal in ITA No. 1836/Mum/2011 vide order dated 08.07.2015 had remanded the matter pertaining to the quantum appeal to the file of the A.O. for *de nova* adjudication for the reason that the assessee was unable to present its case before the Id. CIT(A) owing to the financial crisis faced by the assessee where the Id. CIT(A) in this case had passed an *ex parte* order. The Id. AR further contended that since the quantum appeal has been remanded back to the A.O. for *de nova* adjudication, the penalty levied on the said addition should also be deleted. The Id. AR relied on the decision of the co-

ordinate bench in the case of *ITO vs. Shri Vijay Ajmera* (in ITA No. 3549/Mum/2010 vide order dated 22.07.2011) in which case the ld. CIT(A) has deleted the penalty for the reason that the assessment order itself was set aside by without getting into the merits of the penalty order. The ld. AR further stated that the co-ordinate bench in the above mentioned case has dismissed the appeal filed by the Revenue challenging the impugned order of the ld. CIT(A). The ld. AR prayed that the penalty in the assessee's case should also be deleted on the same ground.

8. The learned Departmental Representative (ld. DR for short) for the Revenue, on the other hand, controverted the submission of the ld. AR and relied on the decision of the lower authorities.

9. We have heard the rival submissions and perused the materials available on record. It is evident that the A.O. had made additions/disallowances on unsecured loan credits u/s. 68 of the Act, disallowance u/s. 41(1) of the Act and short term capital gain and determined the income of the assessee at Rs.94,06,384/-. The assessee challenged the assessment order before the ld. CIT(A) who confirmed the addition made by the A.O. on the ground that the assessee has failed to substantiate its claim. The Tribunal in appeal filed by the assessee had set aside the *ex parte* order passed by the ld. CIT(A) and remanded the issue of addition/disallowances to the A.O. The assessee parallelly was in appeal against the order of the penalty levied u/s. 271(1)(c) of the Act. Even in the penalty proceeding, the assessee remained *ex parte* before the ld. CIT(A) who then confirmed the penalty levied by the A.O. On considering the tribunal's decision in *Shri Vijay Ajmera* (supra) upon by the ld. AR, it is observed that the ld. CIT(A) in this case

had cancelled the penalty order passed u/s. 271(1)(c) of the Act on the ground that the assessment order was set aside by the Tribunal to the A.O. and on an appeal preferred by the Revenue challenging the Id. CIT(A)'s order cancelling the penalty, the Tribunal observed that no interference was warranted on the Id. CIT(A)'s order for the reason that since the assessment order was remanded back to the file of the A.O. there was no assessment order alive and, hence, consequent penalty could not arise. However, the Tribunal concluded that the A.O. is at liberty to initiate the fresh penalty proceedings after completion of the *de nova* assessment order. In the present case in hand, the facts are slightly distinguishable where the Id. CIT(A) has confirmed the penalty levied by the A.O. by way of an *ex parte* order. The Tribunal in the assessee's case for the impugned year has set aside the assessment order for *de nova* adjudication before the Id. A.O. vide its order dated 08.07.2015. The Id. AR for the assessee made a submission that the status of the assessment proceeding is not known, as the assessment order has not been passed till date. The Id. DR when confronted was also not aware of the status of the assessment proceeding subsequent to the order of the ITAT remanding the assessment order to the A.O. Since the assessment order has been remitted back to the file of the A.O., we find no merit in deciding the penalty order levied consequent to the impugned assessment order. On considering the Id. AR's submission that the penalty order has to be deleted for the reason that the assessment order was set aside to the A.O. does not persuade us to do so. Though there are a plethora of cases by the Hon'ble Apex Court and the Hon'ble High Court's which held that if the assessment order is finally set aside or cancelled then the concerned penalty order does not stand of its own, the present case in hand will not fall under that category for the fact that the assessment order has not attained 'finality' in this

case. In our considered view, this penalty order shall also be remanded back to the file of the A.O. for *de nova* assessment of penalty in accordance with the law and the A.O. is directed to decide the issue of penalty afresh as to whether the penalty is to be leviable in the facts and circumstances of the present case.

10. In the result, the appeal filed by the assessee is allowed for statistical purposes.

Order pronounced in the open court on 10.05.2023.

Sd/-

Sd/-

(S Rifaur Rahman)
Accountant Member

(Kavitha Rajagopal)
Judicial Member

Mumbai; Dated : 10.05.2023
Roshani, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. CIT - concerned
4. DR, ITAT, Mumbai
5. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai