IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'H', NEW DELHI

Before Sh. C. M. Garg, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

ITA No. 6722/Del/2018 : Asstt. Year : 2014-15
ITA No. 4873/Del/2019 : Asstt. Year : 2014-15

Tapi JWil JV, C/o C. S. Anand, Adv., 104, Pankaj Tower, 10, L.S.C. Savita Vihar, Delhi-110092	Vs	Income Tax Officer, Ward-62(4), New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AADAT3744J		

Assessee by : Sh. C. S. Anand, Adv.
Revenue by : Sh. Amitabh K. Sinha, CIT-DR

Date of Hearing: 18.07.2023		**Date of Pronouncement: 16.10.2023**

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeals have been filed by the assessee against the orders of ld. CIT(A)-43 and ld. CIT(A)-20, New Delhi dated 25.07.2018 and 22.03.2019.

2. In ITA No. 6722/Del/ 2018, following grounds have been raised by the assessee:

> *"1. That on the facts of the case and under the law, the total income declared by the assessee in its ITR, on the basis of its audited set of P & L A/C and Balance Sheet read with Auditors' Report, ought to had been accepted as it is, particularly when the books of accounts were not rejected by the Id A.O.*
>
> *2. That the authorities below had erred in estimating the income /expense in the hands of the assessee, without appreciating the fact that the assessee had not carried out any business activity on its own, but had awarded sub-contract for Rs.14,86,52,041/-.*

3. That on the facts of the case and under the law, no disallowance out of the expenses incurred / claimed under the head "Sub-Contract Expenses" at Rs 14,86,52,041/- is called for.

The ld. A.O. had computed total income at Rs. 1,20,77,763/- by making disallowance at Rs. 1,18,92,163/- (which amount was worked out by applying rate of 8% on Rs. 14,86,52,041/-) and adding the same to the total income declared by the assessee. On appeal, the Id. CIT(A) had reduced such disallowance to Rs. 54,43,447/- (being the difference between Rs. 56,19,047/- representing the amount worked out by applying the rate of 3.78% on Rs. 14,86,52,041/- and Rs. 1,75,600/- representing the total income declared by the assessee).

That on the facts of the case and under the law, the disallowance sustained by the Id CIT(A) to the extent of Rs.54,43,447/-, is unjustified."

3. In ITA No. 4873/Del/ 2019, following grounds have been raised by the assessee:

"1. That the penalty order passed by the ld AD u/s 271G on 08.02.2017 is liable to be quashed, because it was not passed in accordance with law.

In response to show case notice t. 20.12.2016 (fixing compliance for 27.12.2016), the assessee had filed a letter dt. 26.12.2016 explaining the issues with the help of supporting Without asking for any further clarification /documents, the id AD had passed the order on 29.12.2016 [against which, the assessee had filed an appeal on 30.01.2017 which was disposed at by the it CIT(A) on 25.07.2018). During the pendency of appeal, the Id AO had passed the penalty order u/s 271G on 08.02.2017, while mentioning that by not filing the requisitioned documents, the assessee had violated the provisions of section 92D and thus it is fit case for imposing u/s 271G.

2. That the penalty order passed by the ld AO u/s 271G on 08.02.2017 is liable to be quashed, because there are contradictions in the assessment order and penalty order.

As per the assessment order dt. 29.12.2016, the penalty u/s 271G was imposed on or bee 29.12.2016. As per the penalty order it 08.02.2017, the prior approval was

granted by the JCIT Range-62 New Delhi vide his letter F. No. Joint CIT/R-62/P- 3/2016-17/715 dt. 07.02.2017.

3. That in the peculiar facts of the case and under the law, the penalty levied u/s 271G 25.73.041/- is able to be deleted.

The observations of the authorities below are either factually incorrect or legally untenable.

4. That on the facts of the case and under the law, the Id CIT(A) has erred in confirming the penalty of Rs. 29,73,041/, which was levied by the Id AO vide order dt. 08.02.2017

5. That the penalty u/s 271G deserves to be deleted, because the assessee was prevented easonable cause for the alleged failure.

The penalty us 271G can be levied /sustain only if the default is held to be proved without reasonable cause.

6. That the penalty u/s 271G deserves to be deleted, because the turn over limit stands from Rs. 5 Crores to Rs. 20 Crores, and also because the provision of section 40A(2)(b) stands omitted from section 928BA (meaning of specified domestic transaction."

ITA No. 6722/Del/2018

Estimation of Profit/Section 40A(2)(b):

4. Brief background of the case is as under:

The assessee M/s TAPI Prestressed Products Ltd. ('TPPL') and M/s JITF Water Infrastructure Ltd. ('JWIL') had entered into an agreement to form a Joint Venture (JV) with the specific purpose of bidding for construction of 318 MLD 70 MGD Sewage Pumping Station etc. on design, build and operator basis at Kalyan Puri, Delhi. The contract was awarded by Delhi Jal Board to the assessee JV.

TPPL had executed the work and raised bills for Rs.15,02,04,381/- (Rs. 14,86,52,041/- plus Rs.15,52,340/- being the Labour Welfare Cess) to the assessee JV. The

assessee JV had raised bills for Rs.15,52,33,963/- to Delhi Jal Board. As per the financial statements for F.Y. 2013-14, there was net profit of Rs.1,70,416/-, which is shown as below:

Contract Receipts		155233963
	150204381	155063547
Expenses Sub-Contract Bills VAT/Sales Tax	4657019	
Professional/Consultancy Fees	139972	
Audit Fees	56180	
Bank Charges	337	
Printing & Stationery	400	
Interest on TDS	5188	
Sundry Balances written off	70	
Net Profit		**170416**

The assessee JV had filed its ITR declaring total income of Rs. 1,75,600/- (Rs. 1,70,416/- plus Rs.5,188/- being the amount disallowable).

The AO had passed the assessment order dated 29.12.2016 u/s 143(3) in the status of AOP, determining the total income at Rs. 1,20,77,763/- while making disallowance u/s 40A(2)(b) at Rs.1,18,92,163/-. The AO had formed a view that the assessee JV had suppressed its profit by making excessive payment to TPPL. To work out the amount to be disallowed u/s 40A(2)(b), the AO had applied the net profit rate of 8% on the Sub-Contract Expenses (net) of Rs.14,86,52,038/- (Rs.15,02,04,381/- less Rs.15,52,340/- being the amount of Labour Welfare Cess), and thus arrived at a figure of Rs.1,18,92,163/-.

The ld. CIT(A) had observed that the net profit in the case of TPPL was 3.78%. The ld. CIT(A) had formed a view that profit in the hands of the assessee JV should also be calculated by applying such rate of 3.78%. Accordingly, the ld. CIT(A) had worked out the total income of the assessee JV at Rs.56,19,047/- (3.78% of Rs. 14,86,52,046/-).

5. The pertinent facts of the case of the assessee JV are that,

(i) assessee JV had come into existence only to procure and win the contracts;
(ii) the assessee JV had not executed the work;
(iii) the work had been executed by TPPL; and
(iv) TPPL had raised invoice for Rs. 14,86,52,041/- (net amount) and accounted for such revenue in its books of account and also paid income tax.

6. The AO never alleged nor enquired into the issues nor

(i) recorded his finding that the books of account were not correct & complete;
(ii) doubted the genuineness of the expenses incurred by the assessee JV;
(iii) brought on record any material to prove that the expenses incurred by the assessee JV are excessive or reasonable having regard to the fair market value; and
(iv) recorded his finding that he is rejecting the books of account.

7. The provisions of section 40A(2)(b) are applicable to the expenses which are considered to be excessive or unreasonable, having regard to the fair market value of the goods /services or facilities for which the payments are made. The AO had made disallowance u/s 40A(2)(b), by opining that the assessee JV should have earned income from sub-contracting. The AO had estimated the profit of the assessee JV and determined the income of the assessee JV at Rs.

1,20,77,763/-, by making disallowance u/s 40A(2)(b) at Rs.1,18,92,163/-.

8. We find that the section 40A(2)(b) has no application to income aspect of the assessee JV in the facts of the instant case. The AO has not brought any comparable figures to disallow the expenditure, moreover with the structuring of the JV provisions of Section 40A(2)(b) are not attracted in the given facts and circumstances of the instant case.

9. Reliance is being placed on the judgment of the Hon'ble Delhi High Court in CIT Vs. Oriental Structural Engineers & Ors.(374 ITR 35) wherein it was held – "*dismissing the appeals, that the concurrent findings were that the joint venture was formed only to secure the contract, in terms of which the scope of each joint venture partner's task was distinctly outlined. Further, the entire work was split between the two joint venture partners, they completed the task through sub-contracts and were responsible for the satisfaction of the National Highways Authority of India. Therefore, the Tribunal did not fall into error of law, in holding that the joint venture was not an association of persons liable to be taxed on that basis.*"

10. Hence, we hold that the Assessing Officer has fallen into error in determining the profit @ 8% and also invoking the provisions of Section 40A(2)(b) and the ld. CIT(A) has also erred in determining the profit of the assessee @ 3.78% equal to the profit of one of the parties to the JV.

ITA No. 4873/Del/2019

Penalty u/s 271G:

11. Facts of the case are as under:

The assessee M/s TAPI Prestressed Products Ltd. ('TPPL') and M/s JITF Water Infrastructure Ltd. ('JWIL') had entered into an

agreement to form a **Joint Venture (JV)** with the specific purpose of bidding for construction of 318 MLD 70 MGD Sewage Pumping Station etc. on design, build and operator basis at Kalyan Puri, Delhi. The contract was awarded by Delhi Jal Board to the assessee JV.

TPPL had executed the work and raised bills to the assessee JV. The assessee JV had raised bills for Rs.15,52,33,963/- to Delhi Jal Board. Since, the JV has passed on the work allotted by DJB to its JV partner. The provisions of Section 40(A)(2) have been invoked. The AO also held that the assessee has failed to maintain the required documents as per the provisions of Section 92B of the Act with Rule 10 of the I.T. Rules, 1962. Hence, the AO invoked provisions of Section 271G and levied penalty @ 2% of the value of the transactions which the ld. CIT(A) confirmed.

12. Heard the arguments of both the parties and perused the material available on record.

13. It is an undisputable fact that during the course of assessment proceedings, no specific information/document was required/ requisitioned by the AO. Even in the penalty order, the AO had not clarified as to which specific information or document was called for by him in terms of section 92D(3). It was not the case of the learned AO that certain specific information or document were required/requisitioned by him, which were not furnished by the assessee within the time allowed to it. Rather it was a case where the AO had not required the assessee to furnish any specific information or document.

14. In para 6.1.3, the learned CIT(A) had mentioned " The appellant could not submit satisfactory details before the Assessing Officer nor could submit the same before the undersigned during appeal hearing". It is not be out of place to mention here that even the learned CIT(A) had not specified, as to which particular information or document was required.

15. The provisions of Section 271G are as under:

"Penalty for failure to furnish information or document under section 92D.

271G. If any person who has entered into an international transaction or specified domestic transaction fails to furnish any such information or document as required by sub-section (3) of section 92D, the Assessing Officer or the Transfer Pricing Officer as referred to in section 92CA or the Commissioner (Appeals) may direct that such person shall pay, by way of penalty, a sum equal to two per cent of the value of the international transaction or specified domestic transaction] for each such failure."

16. Provisions of Section 273B are as under:

"Penalty not to be imposed in certain cases.

273B. Notwithstanding anything contained in the provisions of clause (b) of sub- section (1) of section 271, section 271A, section 271AA, section 271B, section 271BA, section 271BB, section 271C, section 271CA, section 271D, section 271E, section 271F, section 271FA, section 271FAB, section 271FB, section 271G, section 271GA, section 271GB, section 271H, section 271-I, section 271J, clause (c) or clause (d) of sub-section (1) or sub-section (2) of section 272A, sub-section (1) of section 272AA or section 272B or sub-section (1) or sub-section (1A) of section 272BB or sub-section (1) of section 272BBB or clause (b) of sub-section (1) or clause (b) or clause (c) of sub-section (2) of section 273, 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."

17. We find that the case of the assessee is squarely covered by the judgment of Hon'ble Delhi High Court in CIT Vs. Leroy Somer and Controls (India) Pvt. Ltd. [360 ITR 532]

"Section 271G of the Income-tax Act, 1961, prescribes penalty in case a person fails to furnish information or document required by sub-section (3) of section 92D to the Assessing Officer or the Commissioner (Appeals). The penalty imposable is discretionary and not mandatory. Section 271G has to be interpreted reasonably and in a rational manner. Information or documentation, which is assessee-specific or specific to the associated enterprises, should be readily available, whereas other documentation or information relating to data bases or transactions entered into by third parties may require collation or collection from time to time. There cannot be any end or limit to the documentation or information relating to data bases or third parties. When there is general and substantive compliance with the provisions of rule 10D of the Income-tax Rules, 1962, it is sufficient. The Legislature has specifically stipulated in section 92D(3) that the Assessing Officer or the Commissioner (Appeals) may require a person to furnish any information or document in respect thereof and on failure of the person to furnish the documentation within the specified time, penalty under section 271G can be imposed. The notice under section 92D(3) should specify the information or document, which was required to be submitted and if and when there is failure or delay in submission of the documentation or information, penalty can be imposed under section 271G. Thus, for imposing penalty the Revenue must first mention the document and information, which was required to be furnished but was not furnished by the assessee within the specified time. The documentation or information should be one specified in rule 10D, which has been formulated in terms of section 92D(1).

Held, dismissing the appeal, that the order passed by the Assessing Officer merely recorded that there was failure to file rule 10D documentation without specifying or stating which document or information was not furnished in spite of the notice calling for the

information or document under section 92D(3) . In the absence of the basic details or facts, the order of the penalty under section 271G could not be sustained."

18. Further, we also held that the penalty u/s 271G deserves to be deleted, also in the light of the judgment of Hon'ble Supreme Court in Hindustan Steel Ltd. Vs. State of Orissa [83 ITR 26] wherein the Hon'ble Apex Court held as under:

"An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will 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. Penalty will not also 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 to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute."

19. Since neither the AO (during the course of assessment proceedings) nor the ld. CIT (A) during the course of appellate proceedings had required the assessee to furnish any specific information or document in terms of section 92D(3), there was reasonable cause for the said failure, if at all any, inadvertently occurred on the part of the assessee.

20. Hence keeping into consideration, the provisions of section 273B and the judgments of the Hon'ble Jurisdictional High Court and the Hon'ble Apex Court, we hold that the penalty imposed u/s 271G be deleted.

21. In the result, the appeals of the assessee are allowed.

Order Pronounced in the Open Court on 16/10/2023.

Sd/- Sd/-

(C. M. Garg) **(Dr. B. R. R. Kumar)**
Judicial Member **Accountant Member**

Dated: 16/10/2023
Subodh Kumar, Sr. PS
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR