

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

BEFORE SHRI R. K. PANDA, VICE PRESIDENT
AND
SHRI VINAY BHAMORE, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.1206/PUN/2023
निर्धारण वर्ष / Assessment Year: 2010-11

Ms. Rajmal Lakhichand, 169, Balaji Peth, Jalgaon- 425001. PAN : AACFR8609L	Vs.	DCIT, Jalgaon.
Appellant		Respondent

Assessee by : Shri Nikhil Pathak
Revenue by : Shri Sourabh Nayak
Date of hearing : 27.06.2024
Date of pronouncement : 10.09.2024

आदेश / ORDER

PER VINAY BHAMORE, JM:

This appeal filed by the assessee is directed against the order dated 20.09.2023 passed by LD CIT(A)/NFAC for the assessment year 2010-11.

2. The appellant has raised the following grounds of appeal :-

"The Grounds of Appeal stated below are WITHOUT PREJUDICE to each other.

1) *THAT the learned CIT(A) erred in confirming the penalty of Rs.62,95,800 u/s. 271(1)(c) of the Act.*

On the facts and in the circumstances of the case, the said penalty be cancelled.

2) *Gross Profit addition*

- 2.1 *THAT the learned CIT(A) failed to appreciate that question of levy of any penalty on account of GP addition made by the Hon'ble ITAT could not arise inasmuch as no such addition was made by the learned AO in the original assessment and consequently there was no initiation of penalty proceedings on this score.*
- 2.2 *THAT the teamed CIT(A) erroneously concluded that addition on account of GP was first made by the CIT(A) in lieu of addition u/s. 40A(2)(a) which was deleted by the learned CIT(A) and the addition on account of GP was reduced by Hon'ble ITAT and the deletion was confirmed by the Hon'ble ITAT and thus consequently erred in levying penalty on this count*
He thus failed to appreciate that no penalty could be levied when addition made by AO (on account of which penalty proceeding were initiated) is deleted by the appellate authorities.
- 2.3 *Penalty confirmed by the learned CIT(A) on the ground of addition involving varying estimates made by the learned CIT(A) and Hon'ble ITAT, on account of alleged gross profit cannot be sustained in law.*
- 2.4 *THAT the learned CIT(A) failed to appreciate that penalty could not be levied when additions including on account of GP are made on an estimated basis and / or where two opinions are possible.*
- 3) *Additions of Rs. 3,08,889
 and Rs.5,59,740*
The learned CIT(A) also erred in confirming penalty on account of disallowance of Rs.3,08,889 out of interest paid and of Rs.5,59,740 out of guest house expenses when all the facts were on record and duly disclosed. He failed to appreciate that no penalty could be justified on issues on which there could be more than one opinion / view.
- 4) *Other Common Grounds*
- 4.1 *The learned CIT(A) ought to have appreciated that penalty proceedings are independent of assessment proceedings and mere addition/disallowance even if confirmed in appeal would not necessarily justify the penalty u/s. 271(1)(c).*
- 4.2 *THAT the learned CIT(A) erred in placing reliance upon cases facts of which are distinguishable while ignoring the decisions relied upon by the appellant.*
- 4.3 *THAT the levy of penalty without specifying the charge as to whether it is for concealing income or for furnishing inaccurate particulars of income and without striking out the inappropriate*

words in the SCN u/s. 274 is bad in law and as such deserves to be cancelled.

4.4 *THAT the learned AO and CIT(A) has seriously erred in not following the decision of the Hon'ble Supreme Court in CIT v. SSA's Emerald Meadows (2016) 242 Taxman 180 upholding decision of the Karnataka High Court in CIT v. Manjunatha Cotton & Ginning Factory. (359 ITR 564)*

5. *GENERAL*

5.1 *The appellant craves leave to add, amend, alter or delete any one or more of the grounds of appeals as may be required in the nature and circumstances of the case.*

5.2 *The appellant prays leave to adduce such further evidence to substantiate its case as the occasion may demand."*

3. The facts, in brief, are that the assessee is a firm engaged in the business of gold and silver, making jewellery and selling such jewellery and bullions. During the course of assessment proceeding, the Assessing Officer got special audit done u/s 142(2A) of the IT Act and on the basis of analysis and comments of special auditor, made the following additions:

- (i) Excess payment disallowed u/s 40A(2)(a) of the Act of Rs.33,32,94,731/-,
- (ii) Disallowance u/s 36(1)(iii) of the Act of Rs.3,08,889/-,
- (iii) Disallowance of expenses of capital nature for guest house of Rs.5,59,740/-.

4. Being aggrieved with the above additions, the assessee preferred an appeal before the Id. CIT(A), who directed the Assessing Officer to make addition of Rs.5,65,54,895/- taking gross profit @ 0.9% of turnover against 0.61% taken by the

assessee, which would cover the disallowance u/s 40A(2)(a) of the IT Act. Against the said action of the ld. CIT(A), the assessee filed an appeal before the ITAT and the ITAT reduced the said addition to Rs.1,76,53,871/-. The other two additions of Rs.3,08,889/- and Rs.5,59,740/- were confirmed by the ld. CIT(A) as well as by the ITAT. Thereafter, the Assessing Officer initiated the penalty proceedings and subsequently imposed the penalty of Rs.62,95,797/- u/s 271(1)(c) of the IT Act being minimum imposable penalty @ 100% of tax sought to be evaded on Rs.1,85,22,500/- [Rs.1,76,53,871/- + Rs.3,08,889/- + Rs.5,59,740/-]. Aggrieved with the penalty order, the appellant preferred an appeal before the ld. CIT(A)/NFAC, who vide impugned order 20.09.2023 confirmed the penalty u/s 271(1)(c) of the IT Act as imposed by the Assessing Officer.

5. Being aggrieved with the decision of the ld. CIT(A)/NFAC dated 20.09.2023, the assessee is in appeal before this Tribunal in the second round of appeal.

6. We have heard LD counsels from both the sides & perused the material available on record. We find that the AO levied penalty u/s 271(1)(c) of the IT Act on 3 grounds as under :

1. GP Addition of Rs.1,76,53,871/- sustained by ITAT on estimate basis.
 2. Disallowance of proportionate interest paid on secured & unsecured loan to the extent of Rs.3,08,889/- being not charged on loan advanced to others.
 3. Disallowance of Rs.5,59,740/- on account of guest house expenses, treating the same as capital in nature.
7. We find that the penalty u/s 271(1)(c) was imposed on the basis of addition of Rs.1,76,53,871/- which was purely based on estimation. It was the contention of LD counsel that no penalty u/s 271(1)(c) can be imposed when income is determined on estimate basis. In this regard, LD AR relied on decision passed by the Co-ordinate Bench of this Tribunal in the case of J. R. Enterprises vs. DCIT in ITA No.3042/Del/2015 for the assessment year 2005-06 order dated 29.10.2018, wherein, the Co-ordinate Bench of this Tribunal deleted the penalty by observing as under :-

“2.1 Now, the assessee is before the ITAT challenging the upholding of penalty by the Ld. Commissioner of Income Tax (A). 3.0 The Ld. AR submitted that the assessee has been maintaining regular books of accounts with respect to the hire charges and maintenance charges but the Ld. Commissioner of Income Tax (A) had rejected the assessee's plea for admitting Assessment year 2005-06 additional evidence as well as examining the books of accounts. It was also submitted that even the Ld. Commissioner of Income Tax (A) had partially sustained the disallowance on an ad hoc basis without

assigning any cogent reason for sustaining a part of the disallowance. The Ld. AR further submitted that it is settled law that penalty u/s 271(1)(c) of the Act could not be sustained in case of ad hoc/estimated disallowances. 4.0 In response, the Ld. Sr. DR placed reliance on the orders of the authorities below and vehemently argued that penalty had been rightly imposed and, therefore deserved to be upheld. 5.0 We have heard the rival submissions and perused the material available on record. The only question for our consideration is whether penalty u/s 271(1)(c) is sustainable with respect to disallowance which has been partially deleted by the Ld. Commissioner of Income Tax(A) on ad hoc/estimated basis. It is undisputed in the present appeal that the quantification of the alleged concealment/inaccurate particulars is only an estimate and it is settled law that penalty is not attracted on estimated additions. The Hon'ble Delhi High Court in the case of CTT vs. Aero Traders Pvt. Ltd., reported in 322 ITR 316 (Del), has held that no penalty u/s 271(1)(c) can be imposed when income is Assessment year 2005-06 determined on estimate basis. Similar view has been taken by the Hon'ble Punjab & Haryana High Court in the case of Harigopal Singh vs. CIT reported in 258 ITR 85 (P&H) and the Hon'ble Gujarat High Court in the case of CIT vs. Subhash Trading Company reported in 221 ITR 110 (Guj). In view of the foregoing precedents including the one from the Hon'ble Jurisdictional High Court, it is apparent that when the bedrock of instant penalty is estimated disallowance, the same cannot be sustained. Accordingly, we set aside the order of the Ld. CIT (Appeals) and direct the AO to delete the penalty.”

8. We therefore respectfully following the above decision passed by a Co-ordinate Bench of the Tribunal in the case of J. R. Enterprises (supra) direct the Assessing Officer to delete the penalty levied u/s 271(1)(c) the IT Act on the basis of estimated GP addition of Rs.1,76,53,871/-.

9. We further find that while imposing penalty u/s 271(1)(c) of the IT Act disallowance of proportionate interest expenses of Rs.3,08,889/- & the disallowance of Rs.5,59,740/- on account of guest house expenses being capital in nature were also taken into

consideration. In this regard, we find that it is true that both the above disallowances were confirmed by LD CIT(A) & also sustained by the ITAT. But, we are unable to accept the contention of LD CIT(A) that mere addition / disallowance warrant the imposition of penalty u/s 271(1)(c) of the IT Act. In this regard, the contention of LD AR is that the non-charging of interest on certain loans may result into a disallowance out of interest paid to others but the assessee cannot be said to have furnished inaccurate particulars of his income or concealed any income, as all the facts were disclosed truly & fully. In this regard, LD AR relied on the judgement passed in the case of CIT vs. Reliance Petroproducts, 322 ITR 158 (SC). We further find that the expenditure of Rs.5,59,740/- towards professional fee of architect for guest house renovation was treated as capital expenditure and disallowed accordingly, but in a situation like this, question of levy of penalty u/s 271(1)(c) does not arise. In this regard, it was the contention of LD AR that the facts relating to the issue were disclosed fully & truly & when the details supplied by the assessee in the return are not found to be incorrect or false, there is no question to invite penalty u/s 271(1)(c) of the IT Act. In this regard, LD AR again relied on the judgement passed in the case of CIT vs. Reliance

Petroproducts, 322 ITR 158 (SC), wherein, it was held that a claim which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars of income by the assessee. We find force in the argument of the assessee on this count and, accordingly, we direct the Assessing Officer to delete the penalty of Rs.62,95,797/- levied u/s 271(1)(c) of the IT Act. Thus, the grounds of appeal filed by the assessee are allowed.

10. In the result, the appeal filed by the assessee stands allowed.

Order pronounced on this 10th day of September, 2024.

Sd/-
(R. K. PANDA)
VICE PRESIDENT

Sd/-
(VINAY BHAMORE)
JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 10th September, 2024.

Sujeet

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The Pr. CIT concerned.
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "B" बेंच, पुणे / DR, ITAT, "B" Bench, Pune.
5. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.