IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'F' NEW DELHI

BEFORE SHRI G.D. AGRAWAL, HON'BLE PRESIDENT
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No. 5742/Del /2015
Assessment Year: 2008-09

ITA No. 5743/Del /2015
Assessment Year: 2008-09

Inderjeet Singh Damania, H-174, Sector 41, Noida. (PAN: AELPD5066N)	vs	ACIT, Circle-33(1), New Delhi.
(Appellant)		(Respondent)

Appellant by : Shri Satish Aggarwal, CA
Respondent by: Shri Atiq Ahmad, Sr. DR

Date of Hearing : 14.09.2017
Date of Pronouncement: 31.10.2017

ORDER

PER BENCH:

Both these appeals have been preferred by the assessee. ITA No. 5742 has been filed against the order passed by the Ld. Commissioner of Income Tax (Appeals) – 17, New Delhi, wherein vide order dated 11/08/2015, the Ld. first appellate authority has confirmed the imposition of penalty of Rs. 2,60,420/-

imposed under section 271(1)(c) of the Income Tax Act, 1961. ITA No. 5743 has been preferred against the order passed by the Ld. Commissioner of Income Tax (Appeals) – 17, New Delhi wherein, vide order dated the 11/08/2015, the Ld. first appellate authority has confirmed the imposition of penalty of Rs. 40,000/- imposed under section 271 (1) (b) of the Income Tax Act, 1961. Both the appeals pertain to assessment year 2008 – 09. Both the appeals were heard together and for the sake of convenience they are being disposed of through this consolidated order.

2. The brief facts of the case are that the assessee, during the year under appeal, had filed his return of income declaring income at Rs. 9,38,237/-. The assessment was completed under section 144 of the Income Tax Act, 1961 at an income of Rs. 12,616,510/-. The AO, while making the assessment, had made addition of the total amount due to the sundry creditors and expenses payable as on 31/03/2008 by holding that the same were not allowable under the cash system of accounting. The tax auditor, in the tax audit report, due to an inadvertent error, had erroneously stated that the method of accounting followed by the assessee was “cash” instead of “mercantile” which was the method of accounting being followed by the assessee. On appeal,

the Ld. CIT (Appeals) deleted the additions of Rs. 69,71,507/- and Rs. 39,40,594/- out of total addition of Rs. 74,31,007/- and Rs. 41,58,026/- made on account of creditors and commission expenses respectively. The Ld. CIT (Appeals), however, sustained addition of Rs. 5,11,590/- towards the closing balances of two creditors on the ground that their PAN numbers were not furnished. The other additions sustained by the Ld. CIT (Appeals) were disallowance of commission paid to small and petty commission agents totalling to Rs. 2,17,433/- and also amount of donations amounting to Rs. 37,150/- not added back by the assessee in the computation of income. The Ld. CIT (Appeals) also confirmed addition of Rs. 28,090/- being inclusion of audit fee twice in the final accounts.

2.1 Subsequently the AO levied penalty of Rs. 60,422/- u/s 271(1)(c) of the Income Tax Act, 1961 on additions/disallowances which was on further appeal confirmed by the Ld. CIT (Appeals) and now the assessee has approached the ITAT challenging the confirmation of such penalty and has raised the following grounds of appeal –

ITA No. 5742/Del /2015

"1. That the order of the Learned CIT (Appeals)-17 New Delhi is arbitrary, biased and bad in law and in facts and circumstances of the case in so far as it confirms penalty order passed under section 271(l)(c) by the Assessing Officer.

2) That the Learned CIT (Appeals) has grossly erred in confirming the levy of penalty under section 271 (1) (c) amounting to Rs. 2,60,420/- without appreciating the fact that the assessee had neither furnished inaccurate particulars of his income nor concealed his income.

3) That the Learned CIT (Appeals) has grossly erred in confirming the penalty levied under section 271(l)(c) of the Act by the Assessing Officer on deeming addition of Rs. 7,66,163/- made under section 68 of the Act.

4) That the Learned CIT (Appeals) has grossly erred in quoting out of context the observations made in judicial precedents quoted by him to confirm the levy of penalty.

That the appellant craves leave to add, alter or delete the above grounds of appeal at the time of hearing.

2.2 Further, the AO has also proceeded to impose penalty of Rs. 40,000 under section 271 (1) (b) of the Income Tax Act vide order dated 30/03/2014 for non-compliance of notice under section 143 (2) dated 29/09/2010, non-compliance of notice under section 142 (1) dated 29/09/2010, non-compliance of notice issued under section 142 (1) dated 15/11/2010 and non-compliance of notice under section 143 (1) dated 10/12/2010. While imposing the penalty, the AO has noted that the show

cause notices were issued to the assessee and duly served upon the assessee before the imposition of the penalty but the assessee had not filed any reply in this regard.

2.3 On appeal, the penalty under section 271 (1) (b) was also confirmed by the Ld. CIT (Appeals) and now the assessee has approached the ITAT and has challenged the confirmation by taking the following grounds of appeal –

ITA No. 5743/Del/2015 :-

"1. That the order of the Learned CIT (Appeals)-17 New Delhi is arbitrary, biased and bad in law and in facts and circumstances of the case in so far as it confirms levy of penalty under section 271(l)(b) by the Assessing Officer.

2) That the Learned CIT (Appeals) has grossly erred in confirming the levy of penalty under section 271 (1) (b) amounting to Rs. 40,000/- without appreciating the fact that the appellant had a reasonable cause.

3) That the Learned CIT (Appeals) has grossly erred in confirming the levy of penalty without the Assessing Officer having issued precise and specific notice for each default u/s 271(1)(b) as envisaged in the provisions of the Act.

That the appellant craves leave to add, alter or delete the above grounds of appeal at the time of hearing.

3. At the outset, the Ld. Authorised Representative submitted that as far as the penalty under section 271 (1) (c) was concerned, penalty was levied on account of addition/disallowances sustained by the Ld. CIT (Appeals) with respect to sundry creditors on the ground that PAN details of two of the creditors were not furnished. It was also submitted that expenses pertaining to donation and double debit of audit fees in the final accounts were confirmed by the Ld. CIT (Appeals) and penalty was levied on these two amounts also. The Ld. authorised representative submitted that penalty was not leviable on amounts added back from sundry creditors as the assessee had not furnished inaccurate particulars of income and the only failure on his part was the inability to furnish PAN numbers of the two creditors. It was submitted that the same was not a mandatory requirement as per the statute. With respect to the expenses on donation and audit fees, it was submitted that the same was, at best, an inadvertent error and the penalty was not leviable on these additions also.

3.1 On the issue of penalty imposed under section 271 (1) (b), it was submitted that differences had developed between the assessee and the tax auditor, who was also the counsel of the

assessee, due to incorrect mention of method of accounting in the tax audit report by the auditor and that the assessee was unaware of the fact that the counsel had stopped attending proceedings before the assessing officer till the receipt of show cause notice proposing to make the assessment and fixing the date of hearing for 20/12/2010. It was also submitted that the assessee himself attended the hearing before the assessing officer on 20/12/2010. It was submitted that there was a valid and reasonable cause for the assessee failing to attend the proceedings which was *bona fide* and, therefore, the penalty deserved to be deleted. Our attention was also drawn to affidavit dated 07/08/2015, submitted by the assessee, in which the facts as submitted before us have been incorporated. It was submitted that the penalty imposed under section 271 (1) (b) be deleted.

4. In response, the Ld. Senior Departmental Representative vehemently argued that both the penalties had rightly been imposed and prayed that the same should be upheld.

5. We have heard the rival submissions and have perused the material on record. As far as the penalty under section 271 (1) (c) is concerned, the Hon'ble Supreme Court, in the case of Hindustan Steel Ltd. v. State of Orissa 83 ITR 26, had laid down

the position of law by holding that the Assessing Officer is not bound to levy penalty automatically simply because the quantum addition has been sustained. Also in case of CIT v. Khoday Eswara (83 ITR 369) (SC), it has been held that penalty cannot be levied solely on basis of reasons given in the original order of assessment.

5.1 The Hon'ble Supreme Court has reiterated the law in case of Dilip N. Shroff v. Jt. CIT 291 ITR 519 by holding in Para 62 that finding in assessment proceedings cannot automatically be adopted in penalty proceedings and the authorities have to consider the matter afresh from different angle.

5.2 Thus, the statute requires a satisfaction on the part of the Assessing Officer. He is required to arrive at a satisfaction so as to show that the assessee has concealed the amount or has furnished inaccurate particulars and this onus is to be discharged by the Department. While considering whether the assessee has been able to discharge his burden the Assessing Officer should not begin with the presumption that he is guilty. Since the burden of proof in penalty proceedings varies from that in the assessment proceedings, a finding in the assessment proceedings that a particular receipt is income cannot

automatically be adopted though a finding in the assessment proceedings constitutes good evidence in the penalty proceedings. In the penalty proceedings the authorities must consider the matter afresh as the question has to be considered from a different angle. The fundamental legal proposition that Assessment proceedings are not conclusive cannot be lost sight of.

5.3 It is well settled that assessment proceedings and penalty proceedings are separate and distinct. The Hon'ble Bombay High Court has laid down in CIT vs. Dharamchand L. Shah 204 ITR 462 (Bom) that findings in Assessment proceedings don't operate as *res judicata* in penalty proceedings. In Vijay Power Generators Ltd vs. ITO 6 DTR 64 (Del) it was held that *"It is well settled that though they constitute good evidence do not constitute conclusive evidence in penalty proceedings."*

5.4 It is again well-settled that during penalty proceedings, there has to be reappraisal of the very same material on the basis of which the addition was made and if further material is adduced by the assessee in the course of the penalty proceedings, it is all the more necessary that such further material should also be examined in an attempt to ascertain

whether the assessee concealed his income or furnished inaccurate particulars. Thus, under penalty proceedings assessee can discharge his burden by relying on the same material on the basis of which assessment is made by contending that all necessary disclosures were made and that on the basis of material disclosed there cannot be a case of concealment of income or furnishing inaccurate particulars of income. Further, if there is any material or additional evidence which was not produced during assessment proceedings same can be produced in penalty proceedings as both assessment and penalty proceedings are distinct and separate.

5.5 In CIT vs. M/s Sidhartha Enterprises 184 Taxman 460 (P & H), it was held by the Hon'ble Punjab & Haryana High Court that the judgment in Dharmendra Textile cannot be read as laying down that in every case where particulars of income are inaccurate, penalty must follow. Even so, the concept of penalty has not undergone change by virtue of the said judgment. Penalty is imposed only when there is some element of deliberate default.

5.6 On the specific facts of the present case, it is seen that the penalty order is woefully silent on the issue as to how this

satisfaction of furnishing of inaccurate was arrived at. The quantum addition on which the penalty has been imposed pertains to disallowance out of sundry creditors, donations not written back and audit fee expenses debited twice. The Ld. CIT (Appeals) has not examined the issue in detail but has simply confirmed the penalty by relying on the findings of the AO and that of the Ld. CIT (Appeals) in the quantum proceedings. However, there is no finding by the authorities below on the issue as to how the 'furnishing of inaccurate particulars' has come to be established so as to warrant imposition of penalty. Thus, it is apparent that the penalty has been imposed as an automatic outcome of the confirmation of the quantum addition. Considering the entirety of the circumstances, in our view, the impugned disallowance does not invite the provisions of Section 271(1)(c) of the Act. Accordingly, we set aside the order of the Ld. CIT (Appeals) and direct the AO to delete the penalty u/s 271(1)(c) of the Income tax Act, 1961.

5.7 As far as the issue of penalty u/s 271(1)(b) is concerned, from a perusal of the section 273B, we understand that, notwithstanding anything contained in the provisions of clause (b) of Sub-section (1) of section 271, no penalty shall be imposed

on the person or the assessee as the case may be, for any failure referred to in the said provision, if he proves that there was reasonable cause for the said failure. So it can be understood that penalty cannot be imposed, if the assessee is able to prove that there was reasonable cause for the said failure of not complying with the notice served on them.

5.8 The meaning of reasonable cause has been discussed in the case of Wodward Governor India P. Ltd. Vs. CIT and Ors. 253 ITR 745 (Delhi). The relevant portion, as contained in Para 5 and 6, is reproduced below:-

> *"What would constitute reasonable cause cannot be laid down with precision. It would depend upon factual background and the scope is extremely limited and unless the conclusions are perverse based on conjectures or surmises and/ or have been arrived at without consideration of relevant material and/ or have been arrived at without consideration leave no scope for interference. Reasonable cause, as applied to human action is that which would constrain a person of average intelligence and ordinary prudence. The expression "reasonable" is not susceptible of a clear and precise definition; for an attempt to give a specific meaning to the word not space. It can be described as rational according to the dictates of reason and is not excessive or immoderate. The word "reasonable" has in law the prima facie meaning of reasonable with regard to those circumstances of which the actor, called on to act reasonably, knows or ough6t o know (see In re, A Solicitor (1945) KB 368 (CA).Reasonable cause can be reasonably said to be a cause which prevents a man of average intelligence and ordinary*

produce, acting under normal circumstances, without negligence or inaction or want of bona fides."

5.9 In the case of Azadi Bachao Andolan v. Union of India 252 ITR 471 (Delhi), the Hon'ble High Court held as under:-

"Section 273B starts with a non obstante clause and provides that notwithstanding anything contained in several provisions enumerated therein including section 271C, 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 A clause beginning with "notwithstanding anything" is sometimes appended to a section in the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision of Act mentioned in the non obstante clause (see Orient Paper and Industries Ltd v State of Orissa, AIR 1991 SC 672) A non obstante clause may be used as a legislative device, to modify the ambit of the provision of law mentioned in the non obstante clause, or to override it in specified circumstances (see T R Thandur v Union of India, AIR 1996 SC 1643) The true effect of the non obstante clause is that in spite of the provision or Act mentioned in the non obstante clause, the enactment following it will have its full operation or that the provisions embraced in the non obstante clause will not be an impediment for the operation of the enactment (see Smt Parayankandiyal Eravath Kanapravan Kalliani Amma v K Devi, AIR 1996 SC 1963) Therefore, in order to bring in application of section 271C in the backdrop of section 273B, absence of reasonable cause, existence of which has to be established by the assessee, is the sine qua non Levy of penalty under section 271C is not automatic Before levying penalty, the concerned officer is required to find out that even if there was any failure referred to in the concerned provision the same was without a reasonable cause The initial burden is on the assessee to show that there existed reasonable cause which wag the reason for the failure referred to in the concerned provision Thereafter the officer dealing with the matter has to consider whether the explanation offered by the

assessee or the person, as the case may be, as regards the reason for failure, was on account of reasonable cause 'Reasonable cause" as applied to human action is that which would constrain a person of average intelligence and ordinary prudence It can be described as probable cause It means an honest belief founded upon reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the person concerned, to come to the conclusion that the same was the right thing to do The cause shown has to be considered and only if it is found to be frivolous, without substance or foundation, the prescribed consequences follow The above being the position, the Commissioner's non-consideration of the plea raised by the assessee about the existence of reasonable cause vitiated the order On that score, we find the order passed by the Commissioner to be non- maintainable."

5.10 Reverting to the facts present case, it has been submitted that assessment proceedings before the AO were earlier being taken care of by the tax counsel, who, however, stopped attending the proceedings without intimating the assessee as differences had developed between the assessee and the counsel. An affidavit to this effect has also been placed on record which has not been contested by the Ld. Senior Departmental Representative. It is our considered opinion that the failure of the assessee's counsel to attend the assessment proceedings without informing the assessee was a reasonable cause which would fall within the exception as provided in section 273B and, therefore,

under the circumstances the penalty imposed under section 271 (1) (b) deserves to be deleted. Accordingly, we set aside the order of the Ld. CIT (Appeals) and direct the AO to delete the penalty imposed under section 271(1)(b) of the Income Tax Act, 1961.

6. In the final result both the appeals of the assessee stand allowed.

The order is pronounced in the open court on 31st October, 2017.

Sd/-	**Sd/-**
(G.D. AGRAWAL)	**(SUDHANSHU SRIVASTAVA)**
PRESIDENT	**JUDICIAL MEMBER**

Dated: 31st October, 2017
'GS'

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

TRUE COPY

By Order

ASSISTANT REGISTRAR