

INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "SMC-1 ": NEW DELHI  
BEFORE SHRI H.S.SIDHU, JUDICIAL MEMBER  
AND  
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER  
(Through Video Conferencing)

ITA No. 1018 & 1019/Del/2017  
(Assessment Year: 2012-13)

Arvind Kumar Arora, Prop. M/s. Milap Polymers, 78B, BW-Block, Shalimar Bagh, New Delhi PAN: ADOPA8023E	Vs.	ITO, Ward-34(2), New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri Satyajeet Goel, CA
Revenue by:	Ms. Rakhi Vimal, Sr. DR
Date of Hearing	27/08/2020
Date of pronouncement	04/09/2020

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. These are the two appeals filed by the assessee for the same assessment year relating to penalty levied u/s 271 (1) (c) of ₹ 160,019/- and u/s 271B of the act of ₹ 88,220 confirmed by the learned CIT – A.
2. The assessee raised the following grounds of appeal in ITA No. 1018/Del/2017 for Assessment Year 2012-13 which is filed against the order of the Commissioner Of Income Tax (Appeals) – 12, New Delhi dated 21<sup>st</sup> of December 2016 wherein the penalty levied u/s 271 (1) (C) of ₹ 160,019/- levied by the learned assessing officer is confirmed:-
  1. *That on the facts and in the circumstances of the case & in Law, the Ld. CIT Appeal had erred in rejecting the appeal filed against the order passed by the Assessing Officer u/s 271 (l)(c) by wrongly imposing penalty of Rs. 160,019/- which is bad in law.*
  2. *That on the facts and circumstances of the case, the assessee has submitted replies during the assessment proceedings before the AO, vide letter dated 23.06.2014 & 10.11.2014, wherein it was stated that the cash deposited in Central Bank of India (Account No. 30434545778) & ICICI Bank (Account No. - 036901002987, & 028805004433) represents the sale proceeds of the retail cloth business. In support of his contentions, the assessee filed the copy of the Audited Balance*

*Sheet, Profit and Loss Account, and Tax Audit Report dated 25.09.2012, u/s 44AB of the Income Tax Act of the cloth business.*

*He has also stated that in the cloth retail business, he has earned a net profit of Rs. 3,09,974/-for AY 2012-13.*

*The accountant of the assessee, however, could not incorporate the income of his retail cloth business amounting to Rs. 3,09,974/-, at the time of filling of Income Tax Return of the assessee by mistake. Accordingly, the assessee, during the course of assessment proceedings, revised the computation of income and added the income of Rs. 3,09,974/- suo moto, before the same was pointed out by the Assessing Officer. The Assessing Officer, however, even after this, was not convinced, and the assessee, in order to buy peace of mind, surrendered another Rs. 2,90,026/-, making the total income from the cloth retail business to Rs. 6,00,000/- during the course of assessment proceedings.*

- 3. That since the assessee had himself revised the Computation of Income, added the income of Rs. 3,09,974/- suo moto, and then further surrendered an amount of Rs. 2,90,026/- suo moto, there is no question of any concealment of income under the provisions of Section 271 (1) (c) of the Income Tax Act.*
  - 4. That it is apparent from the conduct of the appellant that there is no intention to evade legitimate tax liability, and further that demand as created in the assessment has also been deposited without going into litigation, against the assessment completed under Section 143(3) of the Act. Therefore, the allegations as made by the learned assessing officer is not tenable as per record and in law, and hence the penalty as imposed is required to be deleted. As such it may be held that the order u/s 271(l)(c) was bad in law.*
  - 5. That on the facts and circumstances of the case in law there was no deliberate intention to conceal the income & addition to the income have been made on agreed basis without any incriminating evidence against the assessee. The CIT Appeal has failed to appreciate the above facts before dismissing the appeal filed and to this extent the order passed may kindly be held vitiated and bad in law.”*
3. The brief facts of the case shows that assessee is an individual who is engaged in trading of footwear, carrying on the business as a proprietor of M/s Milap polymers, filed his return of income on 29/9/2012 at ₹ 553,590/-. Assessment order u/s 143 (3) of the act was passed on 30 March 2015 wherein addition of ₹ 6 lakhs is made in the hands of the assessee and total assessed income was determined at ₹ 1,153,590/-.
  4. Reason for making addition of Rs 6 lakhs is that as per information gathered As per AIR return it was found that the assessee has been depositing cash in his savings bank account and has also purchased two immovable properties. When questioned, assessee submitted on 23<sup>rd</sup> of

June 2014 and 10 November 2014 stating that cash deposited in Central Bank of India account number 30434545778 and with ICICI bank in account number 036901002987 and 028805004433 belong to retail cloth business carried on by the assessee. It was submitted that assessee has earned net profit of ₹ 309,974/- for that business. Assessee submitted that same could not be disclosed in the income tax return. However as the return could not be revised because of the expiry of time limit, assessee submitted a revised computation of total income and paid tax on it. It was rejected by the learned assessing officer. As the computation of income of cloth business was rejected, learned assessing officer also rejected the profit shown by the assessee from cloth business of ₹ 309,974 and estimated income from it at ₹ 6 lakhs. This was also made to cover up the difference in the gross profit rate. To this assessee agreed and did not file any appeal. At the time of framing the assessment order assessing officer also initiated the penalty proceedings u/s 271 (1) ( C ) and u/s 271B of the act.

5. As the assessment proceedings were complete, the learned assessing officer issued show cause notice on 24 July 2015 u/s 274 of the act which was replied on 26<sup>th</sup> of August 2015. Assessee submitted that he has offered the income of cloth business as per the audited accounts dated 25/9/2012. However to buy peace he has agreed voluntarily for e addition of ₹ 6 lakhs to his income within intention that no penalty would be initiated. He submitted that at the time of return filing, the accountant of the assessee could not file the income of his personal retail business of cloth by mistake. There is no deliberate intention to conceal an income. It was also submitted that assessee is an income tax payee since long and is very prompt and regular in furnishing of returns and payment of statutory liabilities. For this assessment year the assessee has not disputed the addition made in the assessment order and also deposited the tax. Therefore no penalty be levied.
6. Learned assessing officer rejected the contentions of the assessee and held that assessee has not disclosed income of cloth business at the time of filing original income tax return and had the case of the assessee not selected for scrutiny the income from cloth business would have not been

offered by the assessee for taxation which would be a loss for revenue. Therefore the learned assessing officer held that the assessee has concealed/furnished inaccurate particulars of its income and is liable for imposition of penalty u/s 271 (1) (c) of the act and levied the penalty of ₹ 160,019 as per order dated 24 September 2015.

7. Assessee preferred appeal before the learned Commissioner Of Income Tax Appeals wherein the penalty was confirmed as per order dated 21 December 2016. The learned CIT – A held that assessee had no explanation for undisclosed income from cloth business as he has revised his computation of income. According to him, very fact of filing revised computation of income shows that there is a concealment by the appellant as the explanation furnished is not bona fide. It was also rejected that assessee had agreed to the addition to buy peace as such agreement does not have any legal basis. Therefore, it was held that assessee had concealed the particulars of his income from retail cloth business for which penalty was leviable. Order of ld AO was upheld.
8. In appeal before us the learned authorised representative raised an additional ground of appeal as Under:-
  1. That on facts and circumstances of the case, the learned CIT – A was not justified in confirming penalty of ₹ 160,019 u/s 271 (1) (c ) even though there is no case of recording of proper satisfaction in terms of provisions of Section 271 (1) ( C ) of the act and as such the penalty order is illegal and without jurisdiction
  2. That in absence of recording of specific satisfaction of levying specific charge is to concealment of income or furnishing of inaccurate particulars of income, notice u/s 274 and the consequential order is invalid and void ab initio.
  3. That the assessing officer having failed to specify any charge in the assessment order or in the penalty order, the penalty order is in total disregard to mandate of Section 271 (1) (c ) and settled legal principles
9. The learned authorised representative submitted that the grounds raised are purely of legal and consequential nature and arise from penalty order which is subject matter of appeal and no new fact or evidence is required in relation to this ground and accordingly the abovesaid ground may kindly be

admitted in the interest of justice. He further relied on the decision of the honourable Supreme Court in case of NTPC Ltd 229 ITR 363.

10. On the given date of hearing the learned departmental representative sought adjournment. Looking at the smallness of issue, also being covered by decision of Honourable Jurisdictional high court in favour of assessee, we are not inclined to accede to request of Id DR. However, on our request, the learned senior DR Ms Rakhi Vimal assisted the court. She vehemently opposed the admission of the additional ground of appeal.
11. We have carefully considered the rival contention and the additional grounds raised by the assessee. The additional grounds raised goes to the root of the matter and are legal in nature. No fresh facts are required to be investigated. Therefore, in the interest of justice, same are admitted.
12. On the merits of the penalty both the parties are heard. At page number 10 of the paper book assessee has submitted a copy of the notice u/s 274 read with Section 271 of the Income Tax Act and submitted that none of the twin charges has been struck off. On looking at the assessment order also, we do not find that the learned assessing officer has raised any specific charge there. When the
  - a. assessee was not confronted in the assessment order by recording a specific charge whether assessee has concealed income or has furnished inaccurate particulars of income,
  - b. the notice issued u/s 274 of the act is also silent,
  - c. but the learned assessing officer has levied the penalty on concealment of income without confronting assessee of any specific charge,
  - d. Addition made on estimate basis of Rs 6 lakhs when the audited accounts cloth business shows lower profits

Such penalty cannot be sustained in view of the decision of the honourable Delhi High Court in case of Principal Commissioner Of Income Tax Versus Sahara India Life Insurance Co Ltd (ITA Number 475/2019 Dated 2 August 2019 wherein para number 21 the honourable High Court relying on the decision of the honourable Karnataka High Court cancelled the penalty as none of twin charges were struck off in notice u/s 274 of the Act. Therefore respectfully following the decision of the honourable jurisdictional High

Court, we do not find any reason to sustain the penalty. Accordingly, reversing the order of the lower authorities, we delete the penalty imposed u/s 271 (1) (c) of the act of ₹ 160,019/-. Accordingly, additional grounds raised by the assessee are allowed.

13. In the result ITA number **1018/del/2017** filed by the assessee for assessment year 2012 – 13 is allowed.
14. Assessee raised the following grounds of appeal in ITA No. **1019/Del/2017** for Assessment Year 2012-13 against the order of the Commissioner Of Income Tax (Appeals) – 12, New Delhi dated 22 December 2016 wherein penalty levied by the learned assessing officer u/s 271B of The Income Tax Act ,1961 of ₹ 88,220/- is upheld.:-

“1. *That on the facts and in the circumstances of the case & in Law, the Ld. CIT Appeal had erred in rejecting the appeal filed against the order passed by the Assessing Officer, u/s 271B by wrongly imposing penalty of Rs. 88,220/-, which is bad in law.*

2. *That on the facts and circumstances of the case, the assessee was required to get his cloth business accounts audited u/s 44AB of the Income Tax Act, & to obtain the Tax Audit Report for A.Y 2012-13 before the specified date i.e 30.09.2012 for filing of the return which was obtained by the assessee on 25.09.2012, within the prescribed time schedule.*

*It was not required to file Tax Audit report, either physically or submit electronically with the assessing officer having jurisdiction & therefore there was no default in compliance to the requirements u/s 44 AB of the Income Tax Act.*

*It is also submitted that CBDT vide Notification No. 34/2013/F.No. 142/5/2013-TPL dated 01.05.2013, amended Rule 12, w.e.f 01.04.2013, for Assessment Year 2013-14, & the assessee was required to furnish the Tax Audit report u/s 44AB of the Income Tax Act, electronically along with ITR-4 only from A.Y 2013-14 onwards.*

*Therefore, in view of the facts and instructions for filling of return of income for Assessment. Year 2012-13, the assessee was required to get his accounts audited before the specified date, obtain the report from the accountant before the specified date, but it was not required to file the audit report either physically with the assessing officer having jurisdiction over the assessee or to submit electronically, which have been made applicable only w.e.f. AY 2013-14.*

*Therefore, it is submitted that the assessee has no default in compliance to the requirements of Section 44AB of the Income Tax Act, and hence no penalty is leviable under the provisions of Section 271 B of the Act on the assessee.*

*However, during the assessment proceedings, the Assessing Officer, ignored such tax audit report filled, and passed an order under 271B of the Income Tax Act; imposing a penalty for failure to get the accounts audited, which was bad in law.*

3. *That on the facts and circumstances of the case, the assessee was not in default for getting its account audited under the provisions of law. The CIT Appeal, on the appeal filed by the assessee, also failed to appreciate the above facts before dismissing the appeal filed, and to this extent, the order passed may kindly be held vitiated and bad in law.”*
15. On the set of facts already stated earlier, the learned assessing officer initiated penalty u/s 271B of The Income Tax Act by issue of notice for failure to get the books of accounts audited as required u/s 44AB of The Income Tax Act. The learned assessing officer noted that during the year assessee has shown the gross profit rate of 4.89% on sale of ₹ 55.93 lakhs as against gross profit rate of 2.51% on sale of ₹ 140.27 lakhs in the immediately preceding year of the footwear business. Besides that, the assessee was also found to be engaged in trading of clothes. The income of cloth business was not disclosed by the assessee in his return of income. The assessee has also not filed the revised return within a specified period. Therefore, the learned assessing officer noted that assessee has not got the accounts audited of the cloth business u/s 44AB of the income tax act before filing of the return of income.
16. Assessee submitted its reply on 26<sup>th</sup> of August 2015 stating that his accounts for retail business of cloth with turnover of Rs. 176,43,940 with the net profit of ₹ 309,974 is audited u/s 44AB as per tax audit report dated 25<sup>th</sup> of September 2012. He submitted that the books of accounts were audited prior to the due date of filing of return u/s 139 of the income tax act. However, same were not filed with return of income, as the income of cloth business itself was not shown in return of income. He further submitted that as per the relevant rule 12 (2) of the IT Rules, applicable to assessment year 2012 – 13, the copy of audited accounts of the report of audit were not required to be attached with the return of income. The copy of audited trading and profit and loss account and balance sheet along with the tax report dated 25 September 2012 submitted by the assessee to the office of the learned assessing officer during the course of assessment proceedings. He therefore submitted that for that AY, there was no provision

to submit these documents along with the income tax return. In view of this, it was submitted that there is no failure on part of assessee.

17. The learned assessing officer rejected the contentions of the assessee for the reason that assessee has not disclosed income of cloth business at the time of filing of income tax return. He further held that the assessee has not declared the profit on sale of clothes, which shows that assessee, has even not prepared the accounts of the cloth business at the time of filing of return of income. Therefore learned AO noted the total turnover of the cloth business is Rs. 176,43,940, which exceeded the prescribed limit u/s 44 AB of the income tax act and therefore the assessee was required to get his account audited and furnish the audit report before the due date of filing of the return. Accordingly, penalty u/s 271B of the act of ₹ 88,220 was levied by order dated 24 September 2015.
18. Assessee challenged the same before the learned Commissioner Of Income Tax Appeal who also held that assessee had not got his accounts audited before the due date of filing of the return for assessment year 2012 – 13 as it was not submitted before the assessing officer by that time and therefore the penalty levied was confirmed.
19. We have heard the rival parties. The fact shows that appellant is carrying on two different businesses in his individual capacity, one is trading in footwear and other is trading of clothes. In the return of income assessee did not disclose, profit of cloth business. There is no dispute with respect to disclosure of profit of footwear business and audit of books of accounts of that business. Assessee when confronted was found to have not disclosed profit from cloth business. In assessment proceedings assessee submitted computation of profit of cloth business, paid tax thereon and it appears submitted tax audit report of that business also. The tax audit report is dated prior to the due date of filing of the return for assessment year 2012 – 13. The notification issued by the Central Board Of Direct Taxes dated first may 2013 clearly states that the assessee was required to file audit report along with the income tax return form assessment year 2013 – 14 onwards. Therefore, it is possible that assessee may have a view that prior to the date he was not required to file the audit report along with the return of income but obtain tax audit report prior to due date of filing of ROI. . Therefore,



it cannot be said that assessee did not have a 'reasonable cause' for not filing tax audit report along with the return of income. In view of this, we are of the view that the learned lower authorities are not justified in confirming the penalty u/s 271B of the income tax act of ₹ 88,220/-. Accordingly, we allow grounds of appeal of the assessee and cancel penalty-levied u/s 271B of The Income Tax Act.

20. Accordingly ITA number 1019/Del/2017 filed by the assessee is allowed.  
Order pronounced in the open court on 04/09/2020.

-Sd/-  
(H.S.SIDHU)  
JUDICIAL MEMBER

-Sd/-  
(PRASHANT MAHARISHI)  
ACCOUNTANT MEMBER

Dated: 04/09/2020  
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR  
ITAT, New Delhi