

**IN THE INCOME TAX APPELLATE TRIBUNAL,
'C' BENCH, KOLKATA**

**Before Shri Rajpal Yadav, Vice-President (KZ)
&
Shri Girish Agrawal, Accountant Member**

**I.T.A. No. 54/KOL/2020
Assessment Year: 2010-2011**

***Babita Devi Kajoria,.....Appellant
W/o. Unesh Kr. Kajoria,
Jagannath Garden, NSB Road,
P.O. Raniganj-713347, Burdwan, West Bengal
[PAN: ANFPK0759G]***

-Vs.-

***Income Tax Officer,.....Respondent
Ward-3(1), Asansol,
Income Tax Department,
Parmar Building, 54, G.T. Road,
Upper Chelidanga,
P.O. Asansol-713305, Paschim Burdwan (WB)***

Appearances by:

*Shri Aayush Gupta, CA, appeared on behalf of the
assessee*

*Smt. Ranu Biswas, Addl. CIT (D.R.), appeared on
behalf of the Revenue*

Date of concluding the hearing : December 15, 2022

Date of pronouncing the order : December 22, 2022

O R D E R

Per Rajpal Yadav, Vice-President (KZ):-

The assessee is in appeal before the Tribunal against the order of Id. Commissioner of Income Tax (Appeals), Asansol dated 18.11.2019 passed for A.Y. 2010-11.

2. The assessee has taken three grounds of appeal, but her grievances revolve around a single issue, namely Id. CIT(Appeals) has erred in confirming the penalty of Rs.3,09,766/-, which was imposed by the Id. Assessing Officer under section 271(1)(c).

3. Brief facts of the case are that the assessee has filed her return of income on 31.12.2010 declaring total income at Rs.1,78,550/-. It is not discernable from the impugned assessment order, whether any scrutiny assessment had earlier taken place or not but 148 notice issued on 29.03.2017, which according to the Id. Assessing Officer was served upon the assessee. Thereafter he passed an assessment order under section 144 read with section 148 of the Income Tax Act according to his best judgment. It is a very brief assessment order, therefore, we take note of the complete finding available in this assessment order, which reads as under:-

“Assessment Order

The assessee filed his Income Tax Return on 31/12/2010 declaring total income at Rs.1,78,550/- for the AY 2010-11. The return was selected for escaped assessment within the meaning of section 147 of the Income Tax Act, 1961 for the A.Y. 2010-11 and notices u/s 148 of the IX Act, 1961 was issued on dated 29/03/2017 and duly served upon die assesses. However, no return has been filed by the assesses in response to the notice u/s 148 of the I.T. Act,1961, Again, letters were issued on 17/07/2037, 11/09/2017 and 27/11/2017 for necessary compliance. However, no compliance has been made. Sufficient time & opportunities were allowed to the assesses. However, no compliance has been made by die assessee so far.

Under this circumstance, assessment is being made in this case u/s 144 of the I.T.Act, 1961,

After considering the material gathered in course of assessment proceedings, it is found that assessee has shown income from other source of Rs.1,78,550/-. However, from the reply received from NMCE, Ahmedabad in response to this office letter u/s 133(6) of I.T. Act dated 06/10/2017, it is apparent that the assessee earned profit of Rs.11,53,930/-. Therefore, the profit of Rs.11,53,930/- is added to die total income of the assessee and penalty proceeding u/s 271(l)(c) of the I. T. Act, 1961 is initiated for concealment of income.

The total assessed income of the assessee is calculated as under:-

<i>Total Income as shown by assessee</i>	<i>Rs. 1,78,550/-</i>
<i>Add.: As discussed above</i>	<i>Rs.11,53,930/-</i>

Rs.13,32,480/-

Assessed u/s 148/144 as above.

Interests, if any, is/are charged as per I.T. Act, 1961.

Credit of prepaid taxes is allowed, if any.

Demand Notice, Penalty Notice, Computation of income is part of the order.

Copy of the order issued to the assessee.

Sd/-

(Sujit Kumar Garai)

Income Tax Officer, Ward-3(1), Asansol”

4. According to the assessee, the notice was not served upon her and, therefore, for a quite long period, quantum appeal was not filed before the ld. 1st Appellate Authority. When penalty was imposed on 17.05.2018 and it was served upon the assessee, only then she came to know that assessment proceeding has taken against her and she filed a letter dated 13.06,.2018 for supply of necessary papers. A copy of such letter is available at page no. 9 of the paper book. It appears that thereafter some quantum appeal has been filed, which is stated to

be pending before the ld. 1st Appellate Authority. For buttressing this argument, ld. Counsel for the assessee drew our attention towards page no. 32 of the paper book, where correspondence with Faceless Appellate Authority is available. It is pertinent to note that ideally an appeal arising from penalty order is to be decided after finalization of the quantum proceedings, because sub-clause (iii) of Section 271(1)(c) provides a mechanism for quantification of the penalty, which is dependent upon the total additions made to the declared income of the assessee and, therefore, unless a quantum proceedings attained finality, penalty appeals ought to have not been decided by the Appellate Authority. This practice or embargo is not applicable on the ld. Assessing Officer for visiting the assessee with penalty but after passing the penalty order, the Appellate Authority, i.e. CIT(Appeals) or ITAT ought to have waited completion of the quantum proceeding at appellate level.

5. However, after going through the record available before us, we deem it appropriate to adjudicate this appeal without getting ourselves influenced of the quantum proceedings pending before the lower Appellate Authority. We are assigning the reasons for this in the subsequent part of this order.

6. With the assistance of Id. Representatives, we have gone through the record. The reasons for reopening have been brought to our notice, which read as under:-

“Reasons for the belief that Income has escaped assessment:-

Vide letter no. Pr.VideCIT/Asl/Misc. report/2016-2017/7965 dated 21.03.2017 along with letter no. DDIT(Inv.)/Kol/NMCE/Report/2016-17/6070 dated 17.03.2017, this office is in the possession of information pertaining to the systematic evasion of taxes by clients/members of the NMCE(National Commodity Exchange) during different financial years by misuse of the NMCE platform. The matter was perused and found that Shri/Smt Babita Devi Kajoria, PAN - ANFPK0759G, AY 2010-11 booked loss of Rs. 464800/- in the NMCE platform which is adjusted with the business income thus reduces the tax liability.

The assessee filed ITR 2 claiming only income from other sources. No other income was shown by the assessee.

After perusal of records and return on AST, it can be concluded that beneficiary persons have introduced their unaccounted fund and through different layers of shell companies, the unaccounted funds have been ploughed back into their regular books of accounts as commodity loss which is subsequently adjusted with business income.

After considering the above mentioned facts, I have reason to believe that the assessee misused the NMCE platform to escape income atleast to the tune of Rs. 464800/-.

Accordingly, I have reason to believe that the assessee escaped income and for which it is proposed to re-open the case for the AY 2010-11, and issue notice u/s 147/148 of the IT Act, 1961, if approved, in respect of the above mentioned assessee.

Sd/-

Income Tax Officer, Ward-3(1)/ Asansol”

7. A perusal of the above reason would reveal that assessment of the assessee was reopened for excess claim of loss amounting to Rs.4,64,800/- but no addition of this amount has been made in the assessment order. The addition available in the assessment order is of Rs.11,53,930/-. We have extracted the complete

assessment order and a perusal of last paragraph would indicate that it is totally silent for what addition has been made. The ld. Assessing Officer simply observed that he received information from NMCE, Ahmedabad in response to notice under section 133(6) of the Income Tax Act and it appears that the assessee earned profit of Rs.11,53,930/-. This has been added as profit of the assessee, whereas in the reasons he was of the view that the assessee has booked loss of Rs.4,64,800/-. It is totally in contradiction to each other. There is no application of mind at the end of the ld. Assessing Officer. It is true that it is a best judgment assessment order but the ld. Assessing Officer is obliged to conduct a proper enquiry and ascertain the complete facts before reopening of assessment and passing the re-assessment order under section 147/143(3) of the Act.

8. The Hon'ble Bombay High Court in the case of CIT - vs.- Jet Airways reported in 331 ITR 236, Hon'ble Delhi High Court in the case of Ranbuxy Laboratories reported in 336 ITR page 136 and Hon'ble Gujarat High Court in the case of Md. Juned reported in 353 ITR page 172 propounded unanimously that unless an addition is being made in a reassessment order on an item for which assessment was reopened, no other item can be added. In other words, in the present case, assessment was reopened for claiming excess loss of Rs.4,64,800/-, whereas addition of Rs.11,53,930/- has been added as a

profit of the assessee on transactions with NMCE. This quantum addition in itself ought to have not been made and might be deleted in the appellate proceedings. In such situation, it is not desirable that penalty should continue upon the assessee.

9. Apart from the above, Id. Counsel for the assessee has brought to our notice the defects in the penalty proceedings. He drew our attention towards pages no. 4, 5 & 6. At page no. 4 is first show-cause notice issued by the Id. Assessing Officer on 12.12.2017. In the heading of the notice, Id. Assessing Officer has observed that -

“whereas in the course of proceedings before me for the assessment year 2010-11, it appears to me that you:”

Thereafter he narrated certain circumstances and then observed as under:-

“have concealed the particulars of your income against assessment year 2015-16 or furnished inaccurate particulars of such income”.

10. A perusal of the above correspondence would suggest that there is inherent contradiction in the issues of a charge-sheet upon the assessee for which she was required to defend herself. In the title of the show-cause notice, assessment year is mentioned as A.Y. 2010-11, whereas in the body of the notice for which assessee was required to explain her position, the assessment year is mentioned as A.Y. 2015-16. Thus there is no specific

charge levied against the assessee by the ld. Assessing Officer in A.Y. 2010-11.

11. The ld. D.R., however, on the other hand, submitted that a re-assessment order was passed determining the taxable income in the hands of the assessee. In the title of the show-cause notice, correct Assessment Year has been mentioned but in the subsequent part A.Y. 2015-16 has been noted by the ld. Assessing Officer, which can be a typographical error and should not be construed as fatal to the proceedings.

12. We have duly considered the objections raised by the ld. D.R. but we are not impressed upon by his submissions. There is no application of mind at the end of the ld. A.O. either in the assessment order or in the penalty proceedings. He has not categorically proved that assessee has concealed the income or furnished the inaccurate particulars. As observed above, there is an inherent contradiction even for opening of the assessment, vis-a-vis ultimate additions made in the hands of the assessee. On this strength of the Hon'ble three High Courts' decision, this addition itself would not be sustainable though the issue is not before us and we cannot express our opinion about that in the present proceedings, but we can take cognizance of this fact for absolving the assessee from levy of penalty under section 271(1)(c) of the Income Tax Act.

13. In view of the above, the appeal of the assessee is allowed. The order of the ld. CIT(Appeals) as well as the penalty order are quashed.

14. In the result, the appeal of the assessee is allowed.

Order pronounced in the open Court on 22nd December, 2022. Sd/- Sd/-

(Girish Agrawal)
Accountant Member

(Rajpal Yadav)
Vice-President (KZ)

Kolkata, the 22nd day of December, 2022

Copies to : (1) **Babita Devi Kajoria,**
W/o. Umesh Kr. Kajoria,
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Bengal

(2) **Income Tax Officer,**
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Income Tax Department,
Parmar Building, 54, G.T. Road,
Upper Chelidanga,
P.O. Asansol-713305, Paschim Burdwan
(WB)

(3) Commissioner of Income Tax (Appeals),
Asansol;

(4) Commissioner of Income Tax- ;

(5) The Departmental Representative

(6) Guard File

TRUE COPY

By order
Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata

Laha/Sr. P.S.