

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: B : NEW DELHI

BEFORE SHRI R.S. SYAL, AM & SHRI A.T. VARKEY, JM

ITA Nos.6696 & 6645/Del/2014
Assessment Year : 2010-11

Nirmal Kumar Jain,
195/2, Punja Sharif Prem Gali,
Kashmere Gate,
Delhi.

Vs. ITO,
Ward-35(5),
New Delhi.

PAN: AAEPJ6164C

Assessee by : Shri Repudaman Thakur, CA
Deptt. By : Shri Sameer Sharma, Sr. DR

Date of Hearing : 02.03.2016
Date of Pronouncement : 02.03.2016

ORDER

PER R.S. SYAL, AM:

These two appeals by assessee arising out of the orders confirming penalties u/s 271B and section 271(1)(c) of the Income-tax Act, 1961 (hereinafter also called `the Act`) relate to the Assessment Year 2010-11. Since both the appeals are

based on common facts, we are, therefore, proceeding to dispose them off by this consolidated order for the sake of convenience.

2. Briefly stated, the facts of the case are that the assessee filed return declaring total income of Rs.2,05,267/- inclusive of salary and interest from two partnership firms. The AO got AIR information that the assessee had deposited a sum of Rs.1,23,71,885/- in two savings bank accounts maintained with the ICICI Bank. During the course of investigation, it was found that the assessee was having such four bank accounts in which deposits were made. Information was called for u/s 133(6) from these four banks, which divulged that there were cash deposits to the tune of Rs.1.26 crore and other credits amounting to Rs.16.90 lac, totaling to Rs.1.43 crore. On being called upon to produce the books of account, the assessee stated that no such books were maintained. In this backdrop of the facts, the AO estimated the assessee's sales outside books

of account at Rs.1.50 crore. By applying estimated profit rate of 5% on such sales, he made an addition of Rs.7.50 lac. That is how this solitary addition of Rs.7.50 lac was made. Thereafter, the AO imposed penalty u/s 271B and also u/s 271(1)(c) of the Act, which came to be countenanced in the first appeal. Both the penalties are under challenge before us.

3. In so far as the penalty u/s 271B is concerned, it is noticed that the AO has recorded a categorical finding on page 2 of the assessment order that no books of account were maintained by the assessee. Under such circumstances, a question arises as to whether any penalty can be imposed u/s 271B for not getting the books of account audited. The Hon'ble Gauhati High Court in *Suraj Mal Parasuram Todi vs. CIT (1996) 222 ITR 691 (Gau.)*, has held that where no books of account are maintained, penalty should be imposed for non-maintenance of books of account u/s 271A and no penalty can be imposed u/s 271B for violation of section 44AB requiring

audit of accounts. Similar view has been taken by the Hon'ble Allahabad High Court in *CIT vs. Bisauli Tractors (2008) 299 ITR 219 (All)*. The Hon'ble Allahabad High Court reiterated the similar view in *CIT and Anr. Vs. S.K. Gupta and Co. (2010) 322 ITR 86 (All)* by holding that requirement of getting the books of account audited can arise only where the books of account are maintained. In the absence of the maintenance of books of account, there can be no penalty u/s 271B of the Act. In view of the foregoing legal position emanating from the judgments of the two Hon'ble High Courts, we are convinced that penalty u/s 271B ought not to have been levied because the assessee admittedly did not maintain any books of account as has been recorded in the assessment order itself. We, therefore, order for the deletion of penalty.

4. As regards the imposition of penalty u/s 271(1)(c) of the Act on the addition of Rs.7.50 lac, we find that this addition has resulted on estimation of income at 5% on estimated sales

of Rs.1.50 crore. Except that there is no other basis for imposition of penalty. The Hon'ble Delhi High Court in *CIT vs. Aero Traders P. Ltd. (2010) 322 ITR 316 (Del)* has upheld the view taken by the Tribunal in deleting penalty u/s 271(1)(c) which was imposed on the basis of addition made by the AO on estimated profit. Similar view has been taken in a series of judgments including the Hon'ble Punjab & Haryana High Court in *CIT vs. Dhillon Rice Mills (2002) 256 ITR 447 (P&H)*. In this case also, the Hon'ble Punjab & Haryana High Court approved the view taken by the Tribunal in deleting the penalty u/s 271(1)(c) which was based on an estimate of income made by the AO. In view of the foregoing decisions, it is clear that the penalty so confirmed in the instant case cannot be sustained because it was imposed by the AO on the estimate of income made by him. We, therefore, order for the deletion of penalty.

5. In the result, both the appeals are allowed.

Order Pronounced in the open Court on 02.03.2016.

Sd/-

[A.T. VARKEY]
JUDICIAL MEMBER

Sd/-

[R.S. SYAL]
ACCOUNTANT MEMBER

Dated, 02nd March, 2016.

dk

Copy forwarded to:

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

AR, ITAT, NEW DELHI.