

IN THE INCOME TAX APPELLATE TRIBUNAL, JABALPUR BENCH, JABALPUR
(SMC)
(through Virtual Hearing)

BEFORE SH. SANJAY ARORA, HON'BLE ACCOUNTANT MEMBER

ITA Nos.60 & 61/JAB/2021
Assessment Year: 2010-11

Suraj Singh Parihar, Ward 24, Village & PO: Khurd, Madariya, Sidhi (M.P.) [PAN:CFFPS 9706H]	vs.	Income Tax Officer, Ward- 2, Rewa
(Appellant)		(Respondent)

Appellant by	Sh. Sapan Usrethe Adv.
Respondent by	Sh. S.K.Halder Sr. DR
Date of hearing	09/02/2022
Date of pronouncement	16 02/2022

ORDER

Per Sanjay Arora, AM

This is set of two appeals by the Assessee agitating separate orders by the Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi ('CIT(A)' for short) dated 02.11.2021 and 3.11.2021, confirming the levy of penalty under section 271F and section 271(1)(b) of the Income Tax Act, 1961 (the 'Act' hereinafter) respectively by the Assessing Officer (AO) for Assessment Year (AY) 2010-11.

2. The appeals arising allied issues, were posted for hearing and, accordingly, heard together, and are being disposed of per a common order for the sake of convenience.

3.1 Opening the arguments for and on behalf of the assessee-appellant, it was submitted by Shri Usrethe, that the assessee is a man of little means, residing in a remote area of Sidhi, engaged in petty contracts for a living. He had, prior to the current year, never filed a return of income as his income was below the maximum amount not chargeable to tax, and has started filing the returns only w.e.f. AY 2012-13. During the relevant previous year, he worked as a collecting agent for his friend, Shri Shivendra Singh, Proprietor, M/s. Vivek Communications, Sidhi, a franchisee/selling agent of Reliance Telecom Ltd. (RTL), i.e., in the main, for a small commission in lieu of his services, along with other such franchisees operating in the area of Sidhi. The cash collection, which amounted to Rs.11.414 lacs for the year, was accordingly deposited in his bank account (PB pgs. 1-2), transferring the same directly to RTL (Rs.4.606 lacs), and to other franchisees, being M/s. Anoop Enterprises (Rs.3.045 lacs) and M/s R.K. Agency (Rs.96,384). *How could the entire receipt be regarded as his income?* The commission allowed is at a mere 1% - 2%. Even assuming a commission rate of 8%, it would result in an income of Rs.91,312, i.e., much below the taxable limit of Rs. 1.80 lacs for the current year. It is for this reason that the assessee did not file the return of income for this year as well. However, penalty stands levied at Rs.5,000. Further, assessment was framed u/s. 144 read with section 147 of the Act on 05.12.2017, pursuant to a notice u/s. 148(1) on 22.3.2017. The said notice, as well as those following it, being u/s. 142(1), dated 31.8.2017 (for 12.9.2017) and 27.10.2017 (for 07.11.2017), were handed over by him to his local tax consultant for further necessary action. It is only later, on receipt of assessment order on 11.12.2017, that it was explained to him by his consultant that an *ex-parte* assessment had been framed, and that he could not attend the proceedings due to a medical emergency in the family. And who, guilty of non-performance, promised to take up the matter in earnest before the Id. CIT(A), i.e., in first appeal. The subsequent notices in penalty proceedings were also similarly made over to the counsel who, however, did nothing in the matter, resulting in levy of penalty vide orders dated 26/6/2018,

where-after the file was withdrawn from him. All this stands explained per his affidavit dated 07.6.2021 by the assessee before the Id. CIT(A) (PB pgs. 35-36). So, however, penalty, as levied, stands confirmed, i.e., at Rs.10,000, for each of the two notices u/s. 142(1). Reliance was placed by him on *Sanjay Shrivastava v. ITO* (in ITA Nos. 434 to 438/Del/2010) and *Manju Kataruka v. ITO* [2005] 94 TTJ 873 (Kol).

3.2 Shri Halder, the Id. Sr. DR, would, on the other hand, rely on the orders by the Revenue authorities.

4. I have heard the parties, and perused the material on record.

4.1 My first observation in the matter is that there has been no representation before the AO in either case, so that there was no explanation, much less proving a reasonable cause by the assessee before him

4.2 The common ground for the assessee for both the defaults for which penalty has been levied and confirmed, i.e., non-furnishing of the return of income u/s. 139(1), as well as non-compliance of notices u/s. 142(1), is, in sum, the *bona fides* of his conduct; he, illiterate in tax matters, was guided by his consultant, and acted in full faith in him. *Qua* the penalty u/s. 271F, the assessee's case is of a reasonable belief that his income for the year was below the maximum amount not chargeable to tax, so that there was in effect no violation of s.139(1). And for the penalty u/s. 271(1)(b), in the assessee's words, 'blind faith' in his local consultant who, for reasons best known to him, did not represent the assessee, as agreed to. I shall take up the two penalties in seriatim.

4.3 The non-furnishing of the return u/s. 139(1) is explained to be due to the assessee's income being below the taxable limit, as was the case for the earlier years as well. The argument is not without merit inasmuch as, as it appears, the cash deposited on each date is immediately, or soon thereafter, transferred to the franchisees for whom the assessee is stated to be working as a collecting agent for a

commission, or to RTL (on their behalf). However, that does not explain the cash withdrawal of Rs.55,500 between 15.4.2009 to 25.9.2009, as against the cash deposited in account during the said period at Rs. 4.54 lacs. This works to a ratio of 12.22% (of the cash deposit), which cannot be a rate of commission. *How could, in any case, a commission rate be paid at that rate when the person selling the recharge voucher card itself gets a commission of, as stated, 1%-2%, which perhaps may not even cover the cost of collection, involve, presumably, transmuting?* There was, inexplicably, a cessation of cash deposit thereafter, which commenced only in January, 2010, with direct transfers to RTL. Though supported by an affidavit (dated 18/2/2021) by Shri Shivendra Singh (at PB pgs. 11-12), and which is the only cash collection (at rs. 4.606 lacs) which is substantiated in any manner, it is difficult to believe that the franchisee/selling agent would allow payments to be made to the Principal (RTL) directly by the assessee, a third party, or that RTL would accept such direct transfers from a person with no *locus standi*, i.e., insofar as it is concerned. Again, there has been no transfer thereto after 15.3.2010, resulting in an accumulation of bank balance (as on 31.3.2010) to Rs.2.16 lacs (as against an opening balance – 31/3/2009, of Rs. 0.02 lacs). *Why?* It may be that the same stands transferred subsequently, but then there is nothing on record to show so, nor any explanation for the non-transfer of funds to RTL (or any other for that matter), which is surprising considering the nature of the transaction/s as explained; the transfers to RTL on earlier occasions being on the date of cash deposit itself. The bank account after 31.3.2010 is conspicuous by its absence. In fact, considering that cash collection for RTL is, as stated, at Rs. 4.606 lacs only, the cash collection subsequent to 15/3/2010 is clearly not on its' account, which also explains its non-transfer and, consequently, retention in the assessee's bank account. The nature and source of the same remains unexplained. Surely, all this leads one to infer that there is something more than that meets the eye. *Further, what, one may ask, prevented the assessee to file a return of income in response to the notice u/s. 148(1) dated 22.3.2017?* The assessee had been filing

income-tax returns, as stated, since 2012 (i.e., for AY 2012-13, and onwards), so that he cannot be unaware of the procedure for filing the same. Even if therefore no return was filed u/s. 139(1) because of low income – not shown, implying of the assessee being aware of the provisions of law *qua* the obligation to file the return of income, he surely ought to have returned, at whatever income, in response to the notice u/s. 148(1). No tax consultant could be expected to advise his client to ignore the said notice. Shri Usrethe, on being so questioned by the Bench during hearing, would respond by submitting that the penalty u/s. 271F has not been levied for non-furnishing the return u/s. 148(1), but that u/s. 139(1). Sure, penalty u/s. 271F is only *qua* the non-discharge of the obligation u/s. 139(1), but section 148(1) is a *para materia* provision, casting, like wise, an obligation to file the return of income, which is rather more compelling inasmuch as in such a case the Revenue has a reason to believe that the assessee's income chargeable to tax has escaped assessment. No wonder, then, that the AO refers to both the incidents while stating his reason for proceeding to issue the show cause notice for penalty u/s. 271F, as under:

‘As per the provisions laid down in the Act, the assessee was required to file the ITR by 31.03.2011, i.e. upto the end of the relevant Assessment Year. But, the assessee has failed to file the said ITR by the specified time. *The assessee has neither filed his ITR voluntarily nor has he filed it in response to notice u/s 148 of the Act.* Thus, penalty proceedings u/s 271F of the Act are being imposed (initiated) upon the assessee.’ (emphasis, supplied)

In other words, the same is an allied and, to my mind, an important factor inasmuch as it is indicative of the assessee's conduct, which is, thus, of a conscious disregard of his statutory obligation/s. *Bona fides*, both of the assessee's explanation and conduct, is a prerequisite to save penalty. A compliance of the notice u/s. 148(1), furnishing a return of income, even if below the taxable limit, would have at once established the assessee's *bona fides*. I, therefore, for the stated reasons, find the levy of impugned penalty as valid in law.

4.4 Coming to the penalty u/s. 271(1)(b), the assessee's explanation, again furnished for the first time before the Id. CIT(A), is of the non-compliance of the

notices u/s.142(1) on account of professional misconduct of his consultant, who had been entrusted with the work by him. Though stated to be advanced per a sworn affidavit, a perusal of the same (PB pg. 35-36), reveals no such charge or claim? *Why?* That apart, the explanation does not state even the name of the concerned counsel, or of his having been authorized by the assessee to represent him. No satisfactory reply was furnished by Shri Usrethe on these aspects being observed by the Bench during hearing. It is only when an averment is made by way of a sworn affidavit, duly verified and executed before an authority competent in law to take the deposition, giving specific details which are or could only be in the personal knowledge of the deponent, that the same carries some value in law, and can, where so deemed fit and proper, confronted to the party against whom allegation/s stands made thereby, and who, thereupon, has a right to cross-examine and/or file a counter affidavit. In its absence, as explained during hearing itself, it is no more than a self-serving document, making an allegation/s behind somebody's back. *Which counsel, one may ask, could be expected to advise his client not to respond to the notices being regularly received?* As per the assessee, the consultant (unnamed) assured proper representation subsequent to the receipt of the assessment order on 11/12/2017. However, as afore-stated, there has been no representation before the AO in both the penalty proceedings, constraining him to levy the penalty/s and, in fact, even the filing of the first appeals has been with a delay of nearly 600 days! There has been no explanation as to why the consultant, after being apologetic of his consent, continued to behave in such an irresponsible manner, amounting to gross professional misconduct, which cannot be lightly inferred. The other reason stated for the inordinate delay in filing the appeals is the non-connectivity with the Revenue's e-portal, which could at best explain the delay by a few days. Under the circumstances, I find no merit in the assessee's case *qua* penalty u/s. 271(1)(b) as well.

4.5 I may next also discuss the case law relied upon by Shri Usrethe. The decision in *Sanjay Shrivastava* (supra) is distinguishable for more than one reason. As afore-explained (para 4.3), the commission rate, which could be different for different franchisees, is nowhere specified, and the maximum, stated rate of 8% is also inconsistent with the accretion of Rs.2.14 lacs by the year-end, which is exclusive of Rs.0.60 lacs withdrawn cash/expended during the year. Also, the non-compliance of notice u/s. 148(1) betrays a contumacious conduct. The second decision relied upon, i.e., *Manju Kataruka* (supra), was toward the deliberation of the concept of 'reasonable cause' by the Tribunal therein (para 12 of its' order), also read out during hearing. There is, however, no quarrel *qua* the said concept, which finds clear enunciation per judicial pronouncements, and the issue arising is one of its application in the facts and circumstances of the case. Shri Usrethe, on being called upon during hearing to show as to how the assessee's explanation can be said to demonstrate reasonable cause/s in view of the deficiencies therein (refer paras 4.3 & 4.4), could provide no answer. Reasonable cause is always a matter of fact and, accordingly, to be decided considering the entirety of the facts and circumstances of the case. The assessee has to come with clean hands, which it has not in the instant case/s, casting serious doubt on his *bona fides*. The said case law is thus distinguishable on facts and, consequently, of no assistance to the assessee. No other case law was relied upon.

4.6 I decide accordingly.

5. In the result, both the assessee's appeals are dismissed.

Order pronounced in the Open Court on February 16, 2022

Sd/-
(Sanjay Arora)
Accountant Member

Dated: 16/02/2022

* Aks/Sr. PS

Copy of the Order forwarded to:

1. The Appellant: Suraj Singh Parihar, Near Apana Filing Station, Madariya, Sidhi - 486661 (M.P.)
2. The Respondent: Income Tax Officer, Ward-2, Rewa
3. The Principal CIT-2, Jabalpur
4. The CIT(Appeals), National Faceless Appeal Centre, Delhi
5. The Sr. DR, ITAT, Jabalpur
6. Guard File

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