

income at Rs.10,18,101/-. The Assessing Officer, during the course of assessment proceedings, asked the assessee to furnish details of site wise material consumed and labour expenses. The Assessing Officer observed that in some cases, there was only labour contract and material supplied by the contractee. On the ground that the assessee failed to furnish evidences to substantiate this aspect, and as the assessee's Representative agreed to determination of net profit at 5% of the gross receipts after rejecting the books of accounts, the Assessing Officer applied provisions of section 145 of the Act and computed the total income at 5% of turnover. Thereafter the Assessing Officer levied penalty u/s 271(1)(c) vide order dt. 25.6.2009, after considering the reply of the assessee dt. 24.6.2009. The Ld.Commissioner of Income Tax (Appeals) confirmed the penalty.

3. Aggrieved the assessee is before us on the following grounds.

“1. That the books of accounts were rejected by the Assessing Officer without recording any defect in the books of accounts and made the addition purely on estimation of income by applying net profit rate of 5% without establishing the particulars concealed by the assessee.

2. The Ld.AO erred in levying penalty u/s 271(1)(c) of the Act on the ground that there was no concealment of income and income was assessed on estimation basis.

3. That the penalty so levied may please be deleted.”

4. We have heard Shri P.K.Jain, the Ld.Counsel for the assessee and Ms.Shumana Sen, the Ld.Sr.D.R. on behalf of the Revenue.

5. On a careful consideration of the facts and circumstances of the case and on perusal of the papers on record and orders of the authorities below, case laws cited, we hold as follows.

6. This is a case where the assessee agreed to determination of net profit @ 5% of total turnover as he could not furnish details of site wise material consumed and labour expenses incurred, to the satisfaction of the Assessing Officer. The assessee's Representative had submitted that the expenses in question depend on the stage of work being undertaken by the assessee and that in some contracts there is only labour element as the material is supplied by the contractee. The Assessing Officer was not satisfied with this Explanation. He applied the decision of the Hon'ble Supreme Court in the case of K.P.Madhusudan vs. CIT, 251 ITR 99, the Ld.Commissioner of Income Tax (Appeals) relied on the decision of Hon'ble Delhi High Court in the case of CIT vs. Zoom Communications, reported in 191 Taxman 179 (Del) and confirmed the penalty.

7. The Ld.Counsel for the assessee relied on the following decisions.

- i. CIT vs. Vatika Construction P.Ltd. in ITA 1246/2010 judgement dt. 11.10.2012 of Hon'ble Delhi High Court.
- ii. DCIT vs. M/s Fine Line Construction P.Ltd. in ITA no.1270/Del/2011 Delhi 'B' Bench of the Tribunal order dt. 20.7.2012
- iii. Madnani Construction Corporation P.Ltd. vs. CIT (Guj) 296 ITR 045

8. The Ld.D.R. relied on the case laws cited by the Ld.Commissioner of Income Tax (Appeals).

9. In the case of Vatika Constructions P.Ltd. (supra) the Jurisdictional High Court was considering a similar case and held as follows.

“11. There can be no two opinions about the public interest element underlying S.271(1)(c), that it puts all those who file returns, on notice about the consequences they would face in the event they withhold particulars that have a material bearing in their cases, or attempt to mislead the revenue. At the same time, the Assessing Officer, while deciding to initiate proceedings, has to base his opinion on the materials available on record. Here, the assessee had claimed deduction in the computation of expenses, a part of that amount was actually accepted. The amount added back as a result of the assessee’s offer, did not correspond with the total amount representing the payments made through bearer cheques or cash, that was Rs.40,73,180/- (evident from the calculation and documents placed on record before the Tribunal). The impugned judgement has taken notice of this fact.

12. The offer made by the assessee was on the basis that it could not give the details of the parties, and in order to buy peace, the Assessing Officer was requested to tax the gross receipts on net profits basis. This, as noticed earlier, resulted in addition of over Rs.51 lakhs, which represented more than the amount disallowable u/s 40A(3).

14. In the present case, the assessee’s cash payments were concededly not the amount which was disallowed; they had no correlation to what could not be established, and were disallowable. Further, the judicial record would show that when the Assessing Officer decided to initiate penalty proceedings, he had no material to conclude that the assessee had concealed income or provided inaccurate particulars. The assessee did provide particulars, but could not back up its claim with confirmation; its explanation was that the payees insisted on immediately payment, to fulfill their contractual commitment to their suppliers. The payees were small vendors, willing to ensure supply of materials to the assessee’s site. Clearly, a case for business expediency had been urged. Most importantly, the material which led to the penalty order – i.e. absence of the payees at their places or address provided, was gathered after notice u/s 271(1)(c) was issued. The assessee complained of this procedure, calling it unfair, as it ought to have been provided with opportunity in this regard during

the assessment and that material which did not exist at time of initiation of penalty proceeding ought not to have been put against it. This Court is of the opinion that the objection is well founded, because the Assessing Officer did not have the benefit of such material, and therefore could not have, only on the basis of the assessee's offer to be taxed at 8% on gross receipts, have concluded that it had provided inaccurate particulars in its returns. Moreover, the course of action suggested by the Assessing Officer was in fact accepted by the assessee, as reasonable. In these circumstances, the imposition of penalty was not justified. The Court therefore is of opinion that there is no infirmity in the impugned order of the Tribunal. The question of law is therefore answered against the revenue, and in favour of the assessee, the appeal is accordingly dismissed. No costs."

10. As the propositions laid down in this case are squarely applicable to the facts of the present case, we apply the same and delete the penalty in question.

11. We have also gone through the other case laws relied upon by the parties. Suffice to say that they are not applicable to the facts of the present case.

12. In the result the appeal of the assessee is allowed.

Order pronounced in the Open Court on 26TH July, 2013.

Sd/-

Sd/-

(DIVA SINGH)
JUDICIAL MEMBER

(J.SUDHAKAR REDDY)
ACCOUNTANT MEMBER

Dated: the 26th July, 2013

*manga

Copy of the Order forwarded to:

1. Appellant;
2. Respondent;
3. CIT;
4. CIT(A);
5. DR;
6. Guard File

By Order

Asst. Registrar

1. Date of Dictation:
2. Draft placed before the Author on:
3. Draft proposed and placed before Second Member on:
4. Draft discussed/approved by the Second Member on:
5. Approved draft came to Sr.P.S. on:
6. Date of Pronouncement :
7. File sent to Bench Clerk on :
8. Date on which file given to Head Clerk on:
9. Date of dispatching the Order on: