

**IN THE INCOME TAX APPELLATE TRIBUNAL
Pune Bench "A", Pune**

**Before Shri I.C. Sudhir (JM)
and Shri G.S. Pannu (AM)**

**ITA No. 106/PN/2010
(Asstt. Year : 2004-05)**

ITO, Ward 8(1), Pune ... **Appellant**
Pratyaksha Kar Bhavan,
Dr. Ambedkar Marg,
Near Akurdi Railway Station,
Akurdi, Pune-44

v.
Audyogik Tantra Shikshan ... **Respondent**
Santha
C-II, MIDC Chinchwad, Pune

**C.O. No.04/PN/2011
(Arising out of ITA No.106/PN/2010)
(Asstt. Year : 2004-05)**

Audyogik Tantra Shikshan ... **Cross Objector**
Santha
C-II, MIDC Chinchwad, Pune

v.
ITO, Ward 8(1), Pune ... **Respondent**
Pratyaksha Kar Bhavan,
Dr. Ambedkar Marg,
Near Akurdi Railway Station,
Akurdi, Pune-44

Assessee by : Shri Sunil Ganoo
Department by : Shri P.R. More

ORDER

Per I.C. Sudhir, JM

In the appeal, Revenue has questioned action of the Id CIT(A) in deleting the penalty on Rs. 8,69,000/- levied u/s. 271(1)(c) of the Act by the A.O.

2. The assessee in its Cross Objection, has objected the penalty levied by the A.O with this contention that the A.O has not recorded his satisfaction against the alleged default of filing inaccurate particulars of income as contemplated under the statute in the A.Y. 2004-05 and has

failed to initiate the penalty proceeding during the course of assessment proceedings. The assessee also prayed for awarding the cost u/s. 254(2B) of the Act to the assessee.

3. At the outset of hearing, the Ld. A.R. pointed out that the quantum appeal i.e. ITA No. 933/PN/2008 (A.Y. 2004-05), order dated 13th August 2017 has been decided in favour of the assessee as the Tribunal has dismissed the appeal of the revenue. The Ld. D.R., on the other hand, tried to justify the penalty levied by the A.O. Considering the above submission, especially dismissal of appeal preferred by the Revenue in quantum against the relief granted by the Ld CIT(A) on the basis of which addition made by A.O penalty u/s. 271(1)(c) was levied, we do not find reason to interfere with the first appellate order whereby the Ld CIT(A) has deleted the penalty levied by the A.O u/s. 271(1)(c) of the Act. We find that the Ld CIT(A) in para No. 10 of the first appellate order has observed that in the present case A.O himself has rightly taken into account investment in building and machinery as application of income. Lt CIT(A) has noted that application of income as determined by the A.O in this manner exceeded 85% of the income of the Trust for the year. That being the case, the Ld CIT(A) remained of the view that the amendment to Sec. 2(24) (iia) had no bearing on the assessee's case. Under these circumstances, we are of the view that the Ld CIT(A) has rightly held that it is not a fit case for imposition of penalty u/s. 271(1)(c) of the Act. The first appellate order in this regard is reasoned one. We thus do not find infirmity therein. The same is upheld. The Ground is accordingly rejected. Even otherwise, we find that the amount of penalty in question is Rs. 2,86,770/- which is below Rs. 3,00,000/- and hence in terms of the CBDT Instruction No. 3/2011 dt. 9.3.2011 dt. 9.2.2011, the revenue is not supposed to prefer appeal

before the Tribunal against the first appellate order having tax effect or penalty amount below Rs. 3 lakhs. The appeal preferred by the Revenue is also not maintainable on this account.

4. The Ld A.R. referred contents of assessment order filed with the Memo of cross objection.

5. In support of objection No. 1 raised in the cross objection that the A.O did not record his satisfaction during the assessment proceedings about the alleged default of filing inaccurate particulars of income as contemplated under the Statute prevailing in the A.Y. under consideration and further that the A.O has also failed to initiate the penalty proceedings during the course of assessment proceedings, the Ld. A.R cited the decision of Hon'ble Rajasthan High Court in the case of Chiranjilal Tac v/s. Union of India, 252 ITR 353 (Raj.).

6. In support of the Objection No. 2, praying for awarding cost u/s. 254(2B) of the Act, the Ld. A.R. submitted that it is a fit case to award the cost because the A.O was not justified in making the addition in question especially when he himself has taken into account investment in building and machinery as application of income. As long as the conditions specified u/s. 11 are fulfilled by Trust or Institution, any receipt, even if it were to be newly cited within the definition of "income" under the amended Section 2(24) (iia), would still continue to enjoy exemption u/s. 11. The question of exemption arises only if a receipt in the first instance passed within the ambit of "income". He submitted further that for the purpose of exemption, u/s. 11 & 12, the nature of expenditure like capital or revenue does not make any difference as both, equally are regarded as application of income.

6.1 He also pointed out that copy of the assessment order supplied to the assessee is content wise different from the assessment order filed by the revenue along with its memo of the appeal before the Tribunal. Under these circumstances, he prayed for awarding for cost as in his opinion, the assessee has unnecessarily been subjected to harassment including cost of litigation. In this regard, he placed reliance on the decision of Hon'ble Rajasthan High Court in the case of Chiranjilal Tac v/s. Union of India & Others (2001) 252 ITR 333 (Raj.) and of Pune Bench of the Tribunal in the case of Shri Shantaram R. Patil v. ITO, ITA No. 308 and 309/PN/2003 (A.Ys. 1995-96 and 1996-97) order dated 30th June 2004 (copies supplied").

6.2. In view of the above submission, it was submitted that though it is a fit case to award the cost to assessee by the Tribunal, but assessee is not much interested therein since the whole purpose of the assessee is to bring the high handedness of the Department against the assessee to the knowledge of the Tribunal, so that repetition of such harassment by the Department should be avoided in future.

6.3. The Ld. D.R. submitted that in the assessment order placed with the memo of the appeal preferred by the Revenue in para No. 5 thereof, the A.O has talked about initiation of penalty u/s. 271(1)(c) of the Act and at the bottom of the assessment order, he has mentioned about issuance of show cause notice u/s. 274 read with Section 271(1)(c) of the Act. He submitted further that an objection regarding issuance of notice u/s. 274 read with Sec. 271(1)(c) cannot be raised at this stage especially when the assessee has participated in the penalty proceedings,

availing opportunity of pressing his case before the A.O. In this regard, he referred provisions of Sec. 292BB of the Act regarding issuance of different assessment order for the same A.Y., he submitted that it appears to be mistake of human probability.

8. After having gone through the copies of assessment order that filed with the memo of appeal preferred by the Revenue and the other one filed with the memo of cross objection preferred by the assessee, we are surprised to note that contents of assessment orders meant for the same A.Y. 2004-05 in the case of the same assessee, are different. Both the assessment orders are stated to have been passed by the A.O on 25th November 2006. The difference is that para no. 5 of the assessment order filed with the memo of appeal preferred by the revenue contents the concluding sentence "In this regard, assessee Trust has not submitted any supporting document, evidence, hence penalty u/s. 271(1)(c) of the I.T. Act 1961 is initiated separately." In the assessment order filed along with memo of cross objection, para no. 5 of the assessment order does not contain the said sentence. Similarly, at the bottom of the assessment order filed by the revenue, the concluding sentence is "issue penalty, show cause notice u/s. 274 r.w.s. 271(1)(c) of the I.T. Act 1961" is missing in the assessment order filed by the assessee along with memo of cross objection preferred by it. The copy of assessment order filed by the assessee with its cross objection is a certified true copy by the ITO and further certified as true copy by the assessee. The above stated facts and circumstances suggest that the A.O has tried to cover up its lapses in not mentioning his satisfaction that it is a fit case for levy of penalty u/s. 271(1)(c) and recording of the initiation of penalty proceedings in the assessment order, which cannot in any way be

appreciated. Under these circumstances, there is no reason to doubt the allegation of the assessee that the A.O was adamant to harass the assessee. Thus, in our view, it is a fit case of awarding cost u/s. 254(2B) of the Act, but at the same time, we appreciate the approach of the assessee as discussed hereinabove that they are not interested in the awarding of the cost but their whole purpose in making such request in awarding the cost is only to bring the high handedness of the A.O against the assessee to the notice of the Tribunal. Under the circumstances, we though restrain ourselves from awarding the cost as wished by the assessee, but at the same time, we are inclined to record over here before parting with the order that A.O should have confined himself in making just and proper assessment only, as per the provisions of the law and harassment of the assessee which is not permitted under the Statute should have been avoided at all cost. We hold that the penalty levied u/s. 271(1)(c) was also not valid since the A.O during the course of assessment proceedings, had failed to record his satisfaction that there was concealment of particulars of income or furnishing inaccurate particulars on the part of the assessee towards addition made by the A.O and the A.O had also failed to initiate penalty proceedings during the course of assessment proceedings. The Ld CIT(A) was thus justified in deleting the penalty.

The appeal preferred by the revenue is thus dismissed and the Cross Objection is allowed.

The order is pronounced in the open Court on 30th June 2011.

Sd/-
(G.S.PANNU)
ACCOUNTANT MEMBER

Sd/-
(I.C. SUDHIR)
JUDICIAL MEMBER

Pune, dated the 30th June, 2011

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Copy of the order is forwarded to :

1. The Appellant
2. The Respondent
3. The CIT- V, Pune
4. The CIT(A)-V, Nashik
5. The D.R. "A" Bench, Pune
6. Guard File

By order

Assistant Registrar
Income Tax Appellate Tribunal
Pune