

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH, 'B' PUNE – VIRTUAL COURT

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI S.S.VISWANETHRA RAVI, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.538 & 539/PUN/2018
निर्धारण वर्ष / Assessment Years : 2009-10 & 2011-12

Shrivallabh V. Shete, Shree Associates, 24, Bhagwati Complex, 4 th Floor, Above Bharti Sah. Bank Ltd., PAN Card Club Road, Baner, Pune 411 045 PAN : AVJPS3017K	Vs.	DCIT, Circle-5, Pune
Appellant		Respondent

Assessee by Shri Kishor Phadke
Revenue by Shri Mahadevan A.M. Krishanan

Date of hearing 17-05-2021
Date of pronouncement 18-05-2021

आदेश / ORDER

PER R.S.SYAL, VP :

These two appeals by the assessee arise out of the separate orders dated 30-08-2017 & 13-09-2017 confirming penalty of Rs.81,950/- in relation to the assessment year 2009-10 and Rs.29,50,876/- in relation to the assessment year 2011-12 u/s.271(1)(c) of the Income-tax Act, 1961 (hereinafter also called 'the Act').

2. It is seen that the assessment order for the A.Y. 2009-10 was passed u/s.144 of the Act making an addition of Rs.2,73,170/- towards loss on sale of car which was claimed by the assessee by

debiting his Profit and loss account, but not allowed by the Assessing Officer (AO) for the reason of no separate allowability of such loss after the advent of the scheme of block of assets. Thereafter, penalty was imposed u/s.271(1)(c) with reference to this addition, which came to be affirmed in the first appeal.

3. For the A.Y. 2011-12, the assessee claimed exempt agricultural income of Rs.1,01,62,920/-. In making the assessment u/s.144, the AO made addition for such a sum. Thereafter, penalty was imposed by the AO u/s.271(1)(c) with reference to this addition, which came to be countenanced in the first appeal. The assessee has come up in appeal before the Tribunal.

4. We have heard the rival submissions through the virtual court and scanned through the relevant material on record. The assessee has raised the following two additional grounds in both the appeals:

“4. Appellant contends that the learned CIT(A)-3, Pune erred in law and on facts in confirming penalty u/s.271(1)(c) of the ITA, 1961; levied by the learned AO, without appreciating that, the learned AO has not mentioned any specific charge or limb for initiating penalty u/s.271(1)(c) of the ITA, 1961 in assessment order.

5. Appellant contends that the learned CIT(A)-3, Pune erred in law and on facts in confirming penalty u/s.271(1)(c) of the ITA, 1961 levied by the learned AO, without appreciating that, the notice u/s.274 r.w.s.271(1)(c) dated 25/03/2014, refers to both the limbs of section 271(1)(c) of the ITA, 1961.”

5. The Hon'ble Supreme Court in *National Thermal Power Company Ltd. Vs. CIT (1998) 229 ITR 383 (SC)* has observed that “the purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the tribunal for the first time, so long as the relevant facts are on record in respect of that item”. Answering the question posed before it in affirmative, their Lordships held that on the facts found by the authorities below, if a question of law arises (though not raised before the authorities) which has bearing on the tax liability of the assessee, the Tribunal has jurisdiction to examine the same. Having gone through the subject matter of the additional grounds taken by the assessee, it is discernible that they raise a pure question of law. We, therefore, admit the same.

6. The case of the assessee is that the AO did not strike off the irrelevant limb in the notice issued u/s.274 r.w.s. 271(1)(c) of the Act. We have examined the notice u/s.274 for the assessment year

2009-10, whose copy has been placed at page 1 of the paper book in which both the limbs are present, namely, “*have concealed the particulars of your income*” or “*furnished inaccurate particulars of your income*”. None of them was struck off by the AO. As against that, the penalty has actually been imposed on account of claiming loss on sale of asset, which falls only under the second limb, namely, “*furnishing of inaccurate particulars of income*”.

7. Similar is the position for the assessment year 2011-12. A copy of notice u/s.274 has been placed on record. The first notice u/s.274 of the Act is dated 25-03-2014 and the second is dated 23-07-2014 – both for the year under consideration. In both the notices, the AO has not struck off either of the limbs and both the limbs are present. As against that, again the point is that the addition is because of the denial of status of agricultural income claimed by the assessee. The penalty, if any, on this score could have been imposed under the second limb, namely, “*furnishing of inaccurate particulars of income*”. It is evident that for both the years under consideration that the AO did not mention correct charge in the notices u/s 274 of the Act. He allowed to remain present both the charges envisaged u/s 271(1)(c) in his notices u/s 274 of the Act. Recently, the full Bench of Hon’ble Bombay High

Court in *Mohd. Farhan A. Shaikh Vs. Dy.CIT (2021) 125 taxmann.com 253 (Bom)* has considered this very issue. Answering the question in affirmative, the Full Bench held that a defect in notice of not striking the relevant words vitiates the penalty even though the AO had properly recorded the satisfaction for imposition of penalty in the order u/s 143(3) of the Act. In another judgment, the Hon'ble Bombay High Court in *Pr.CIT Vs. Golden Peace Hotels and Resorts (P.) Ltd. (2021) 124 taxmann.com 248 (Bom)* also took similar view that where inapplicable portions were not struck off in the penalty notice, the penalty was vitiated. The SLP of the Department against this judgment has recently been dismissed by the Hon'ble Supreme Court in *Pr.CIT Vs. Golden Peace Hotels and Resorts (P.) Ltd. (2021) 124 taxmann.com 249 (SC)*.

8. In view of this overwhelming position, it is clear that where the charge is not properly set out in the notice u/s 274 viz., both the limbs stand therein without striking off of the inapplicable limb, but the penalty has, in fact, been levied for one of the two, such a penalty order gets vitiated. Turning to the facts of the extant cases, we find from the notices u/s 274 of the Act that the AO did not strike out the irrelevant limb there from. Respectfully following the

Full Bench judgment of the Hon'ble jurisdictional High Court, we overturn the impugned orders on this legal issue and direct to delete the penalty for both the years.

9. In the result, the appeals are allowed.

Order pronounced in the Open Court on 18th May, 2021.

Sd/-
(S.S. VISWANETHRA RAVI)
JUDICIAL MEMBER

Sd/-
(R.S.SYAL)
VICE PRESIDENT

पुणे Pune; दिनांक Dated : 18th May, 2021
सतीश

आदेश की प्रतिलिपि □ ग्रेषित/Copy of the Order is forwarded to:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A)-3, Pune
4. The PCIT-2, Pune
5. DR, ITAT, 'B' Bench, Pune
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	17-05-2021	Sr.PS
2.	Draft placed before author	17-05-2021	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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