

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "B", MUMBAI

BEFORE SHRI G.S.PANNU, ACCOUNTANT MEMBER
AND
SHRI AMARJIT SINGH, JUDICIAL MEMBER

ITA No.1476/Mum/2014
To

ITA No.1481/Mum/2014
(Assessment Years 2005-06 to 2010-11)

Shri Binod Kumar Singh,
C/o. V.J. Shah & Co.,
401-406, 'K' Building,
24, Walchand Hirachand Marg,
Ballard Estate, Mumbai 400001
PAN:AJAPS5110J

..... Appellant

Vs.

The DCIT, CC – 18 &19,
Aaykar Bhavan, M.K.Road,
Mumbai

.... Respondent

Appellant by : Shri Shri Sanjay Parikh
Respondent by : Shri Mohammed Rizwan
Date of hearing : 18/10/2016
Date of pronouncement : 21/10/2016

ORDER

PER G.S.PANNU,A.M:

These are six appeals by the assessee pertaining to assessment years 2005-06 to 2010-11 involving a common issue relating to levy of penalty under section 271(1)(c) of the Act. Since the facts and circumstances in all the appeals stand on similar footing, the appeal for assessment year 2005-06 is

taken as the lead case. This appeal is directed against an order passed by CIT(A)-39, Mumbai dated 31/01/2014, which in turn, arises out of an order passed by the Assessing Officer under section 271(1)(c) of the Income Tax Act, 1961 (in short 'the Act') dated 26/09/2013.

2. In brief, the relevant facts are that the assessee is an individual, who is Executive Director of M/s. Ispat Industries Ltd., a flagship company of Ispat Group of cases, which was covered under a search action carried out by the Department under section 132(1) of the Act. The assessee was also covered under such search action and as a consequence for assessment year 2005-06 a notice under section 153A of the Act dated 17/1/2012 was issued and in response assessee filed a return of income on 01/03/2012 declaring a total income of Rs.1,60,26,130/-, whereas in the original return of income filed under section 139(1) of the Act on 29/7/2005, the total income declared was Rs.1,59,22,176/-. The difference in the total income as per the original return of income and the return of income filed in response to notice under section 153A of the Act was on account of interest income of Rs.1,15,951/-, which was not offered to tax in the original return of income. The ensuing assessment under section 143(3) r.w.s 153A was finalized on 28/3/2013, whereby the returned income was accepted at Rs.1,60,26,130/-. Subsequently, the Assessing Officer passed an order dated 26/09/2013 holding the assessee guilty of default under section 271(1)(c) of the Act and imposed a penalty of Rs.39,029/- being 100% of tax sought to be evaded on the income of Rs.1,15,951/-. The said levy of penalty has been upheld by the CIT(A) also and as a consequence assessee is in further appeal before us.

3. Before us, the Ld. Representative for the assessee submitted that before joining M/s.Ispat Industries Ltd., assessee was the Managing Director of Steel

Authority of India Ltd.(in short SAIL), a Government of India Undertaking and that assessee was a technical person, who was depending on the staff of SAIL and/or Ispat Industries Ltd. for filing of his return of income for the respective years. The Ld. Representative for the assessee pointed out that the original return of income was filed as per compilation done by the staff of M/s. Ispat Industries Ltd. declaring salary income only and after the search action assessee appointed a firm of Chartered Accountants. With the professional help of the firm of Chartered Accountants, the returns were filed in response to notices issued under section 153A of the Act and at that stage it was noticed that interest income on account of National Saving Certificate, bank interest, etc. were hitherto not offered for taxation in the original return of income. It has been explained that during the course of search no incriminating material was found and the difference between the income declared in the original return of income and the return filed in response to notice issued under section 153A was on account of the aforesaid interest income not offered to tax earlier. The Ld. Representative for the assessee explained that non-disclosure of interest and other income in the original return of income filed by the assessee was on account of the staff of SAIL/Ispat Industries Ltd., who compiled the return of income filed by the assessee only on the basis of the salary certificate. The Ld. Representative for the assessee submitted that there was no justification for levy of penalty under section 271(1)(c) of the Act, inasmuch as, the income returned in the return filed in response to the notice issued under section 153A of the Act has been accepted as such. It was pointed out that there was no detection, either during the course of search or during the subsequent assessment proceedings carried out with respect to the return filed in response to notice issued under section 153A of the Act, which

would show that assessee had either concealed or furnished inaccurate particulars of income within the meaning of section 271(1)(c) of the Act.

3.1 Notwithstanding the plea regarding the absence of merit for levy of penalty, the Ld. Representative for the assessee raised a preliminary objection that the penalty proceedings were initiated by the Assessing Officer for concealment of particulars of income, whereas the penalty has been imposed by the Assessing Officer for furnishing inaccurate particular of income. The point made out by the assessee is that since the charge for which the penalty proceedings have been initiated is different from the basis on which it has been levied, the penalty order passed by the Assessing Officer is unsustainable and in this regard relied on the judgment of the Hon'ble Karnataka High Court in the case of CIT vs. Manjunatha Cotton and Ginning Factory, 359 ITR 565(Kar). It has also pointed out that the said decision has also been applied by the Mumbai Tribunal in the case of Dharni Developers v. ACIT, 40 ITR (Trib) 720(Mumbai), wherein penalty was set-aside on the ground that initiation was for one default, whereas the imposition of penalty was for another default.

4. On the other hand, Ld. Departmental Representative defended the action of the lower authorities levying the penalty under section 271(1)(c) of the Act and pointed out that in the assessment order the Assessing Officer has in the penultimate para directed for issue of notice under section 274 r.w.s. 271(1)(c) of the Act implying that the penalty has been initiated in the context of section 271(1)(c) of the Act as a whole and not merely on any one of the limbs prescribed therein.

5. We have carefully considered the rival submissions with respect to the preliminary objection raised by the assessee. Before we proceed further, we

may briefly recapitulate the factual matrix, which lies in a very narrow compass. In the instant case, consequent to a search action, a notice under section 153A of the Act was issued to the assessee and in response assessee filed return of income declaring a total income of Rs.1,60,26,130/- as against an income of Rs.1,59,22,180/- declared in the original return of income filed under section 139(1) of the Act, thereby resulting in a difference of Rs.1,15,951/-. The said difference is on account of interest income earned from various sources, which was hitherto not declared in the original return of income filed under section 139(1) of the Act. The assessment was finalized on the returned income of Rs.1,60,26,130/- as such. However, the grievance of the assessee is that the Assessing Officer levied penalty under section 271(1)(c) of the Act with respect to such difference.

5.1 The preliminary objection of the assessee is to the effect that the Assessing Officer initiated penalty proceedings under one limb of the provisions of section 271(1)(c) of the Act but ultimately it has been levied under another limb, which is impermissible. In this context, it would be pertinent to note that section 271(1)(c) of the Act, empowers the Assessing Officer to levy penalty, if he is satisfied that assessee has either concealed particulars of his income or furnished inaccurate particulars of such income. Quite clearly, the penalty under section 271(1)(c) of the Act is imposable in two situations, namely, either for concealment of the particulars of income or for furnishing inaccurate particulars of such income. The case made out by the assessee is that in the assessment order the Assessing Officer initiated penalty proceedings for concealment of particulars of income, whereas the penalty has been imposed for furnishing of inaccurate particulars of income, qua the

income in question. In this context, we notice that in the assessment order the Assessing Officer noted as under:-

“The difference in the total income as per original return of income and return of income filed in response to notice under section 153A of the Act was explained to be on account of interest income of Rs.1,15,951/-, which was not offered to tax in the original return of income. Penalty proceedings u/s.271(1)(c) of the Act are initiated separately for concealment of particulars of income in the return of income filed u/s.139(1) of the Act.”

Whereas in the penalty order the Assessing Officer concludes the imposition of penalty in the following words:-

“Therefore, I am of the opinion that the assessee has furnished inaccurate particulars of income within the meaning of sec.271(1)(c) of I.T. Act for the year under consideration within the meaning of explanation to the said section and has thereby rendered himself liable for penalty u/s.271(1)(c) of I.T. Act therefore, I am satisfied that this is a fit case for levy of penalty u/s.271(1)(c) of the I.T.Act, 1961.”

5.2 Thus factually speaking, it is quite clear that the observations made by the Assessing Officer in the assessment order show that the penalty proceedings have been initiated for concealment of particulars of income, whereas in the penalty order, the levy has been determined on the ground that assessee has furnished inaccurate particulars of his income.

5.3 In this context, it would be germane to refer to the judgment of the Hon'ble Karnataka High Court in the case of Manjunatha Cotton and Ginning Factory(supra), wherein general principles with respect to the operation of section 271(1)(c) of the Act have been explained. One of the legal propositions laid down by the Hon'ble High Court is to the effect that taking up of penalty proceedings under one limb and finding the assessee guilty of another limb is

bad in law. The relevant discussion by the Hon'ble High Court in this regard reads as under:-

“60. Clause (c) deals with two specific offences, that is to say, concealing particulars of income or furnishing inaccurate particulars of income. No doubt, the facts of some cases may attract both the offences and in some cases there may be overlapping of the two offences but in such cases the initiation of the penalty proceedings also must be for both the offences. But drawing up penalty proceedings for one offence and finding the assessee guilty of another offence or finding him guilty for either the one or the other cannot be sustained in law. It is needless to point out satisfaction of the existence of the grounds mentioned in Section 271(1)(c) when it is a sine qua non for initiation or proceedings, the penalty proceedings should be confined only to those grounds and the said grounds have to be specifically stated so that the assessee would have the opportunity to meet those grounds. After, he places his version and tries to substantiate his claim, if at all, penalty is to be imposed, it should be imposed only on the grounds on which he is called upon to answer. It is not open to the authority, at the time of imposing penalty to impose penalty on the grounds other than what assessee was called upon to meet. Otherwise though the initiation of penalty proceedings may be valid and legal, the final order imposing penalty would offend principles of natural justice and cannot be sustained. Thus once the proceedings are initiated on one ground, the penalty should also be imposed on the same ground. Where the basis of the initiation of penalty proceedings is not identical with the ground on which the penalty was imposed, the imposition of penalty is not valid. The validity of the order of penalty must be determined with reference to the information, facts and materials in the hands of the authority imposing the penalty at the time the order was passed and further discovery of facts subsequent to the imposition of penalty cannot validate the order of penalty which, when passed, was not sustainable.

61. The Assessing Officer is empowered under the Act to initiate penalty proceedings once he is satisfied in the course of any proceedings that there is concealment of income or furnishing of inaccurate particulars of total income under clause (c). Concealment, furnishing inaccurate particulars of income are different. Thus the Assessing Officer while issuing notice has to come to the conclusion that whether is it a case of concealment of income or is it a case of furnishing of inaccurate particulars. The Apex Court in the case of Ashok Pai reported in 292 ITR 11(SC) at page 19 has held that concealment of income and furnishing inaccurate particulars of income carry different connotations. The Gujrat High Court in the case of Manu Engineering Works reported in [1980] 122 ITR 306 (Guj) and the Delhi High Court in the case of CIT v. Virgo

Marketing Pvt. Ltd. reported in [2008]171 Taxman 156, has held that levy of penalty has to be clear as to the limb for which it is levied and the position being unclear penalty is not sustainable. Therefore, when the Assessing Officer proposes to invoke the first limb being concealment, then the notice has to be appropriately marked. Similar is the case for furnishing inaccurate particulars of income. The standard proforma without striking of the relevant clauses will lead to an inference as to non-application of mind”.

5.4 On the basis of the aforesaid discussion, a relevant premise which can be deduced for the present purpose is that where the basis of the initiation of penalty proceeding is not in accordance with the basis on which the penalty has been ultimately imposed, the imposition of penalty in such circumstances would be invalid. At this stage, we may also refer to the judgment of Hon'ble Gujarat High Court in the case of K.M.Bhatia (Quarry) vs. CIT,193 ITR 379(Guj), wherein also similar proposition has been expounded, namely, that penalty proceedings having been initiated on the ground of furnishing of inaccurate particulars of income would not validate the imposition of penalty on the ground of concealment. Our Co-ordinate Bench in the case of Dharni Developers (supra) has also taken a similar view following the ratio of the judgment of the Hon'ble Karnataka High Court in the case of Manjunatha Cotton and Ginning Factory (supra). In fact, specifying the particular limb under which the assessee is to be penalized under section 271(1)(c) of the Act is of paramount importance as can be understood from the fact that in the case of SSA's Emerald Meadows: S.L.P(C) No.23272 of 2016, the Hon'ble Supreme Court has on 5/8/2016 dismissed the SLP, which had arisen from the judgment of the Hon'ble Karnataka High Court in ITA No.380 of 2015 dated 23/11/15, wherein the Hon'ble Karnataka High Court following its earlier judgment in the case of Manjunatha Cotton and Ginning Factory(supra) held

that the notice issued by the Assessing Officer under section 274 r.w.s. 271(1)(c) of the Act was bad in law as it did not specify in which limb of section 271(1)(c) of the Act penalty had been initiated i.e. whether for concealment of income or for furnishing of inaccurate particulars of income. No doubt, the case before us is not on the footing that the limb of section 271(1)(c) of the Act has not been specified at the time of initiation of penalty, but we are referring to the aforesaid only to emphasize the importance that is placed on the requirement to specify the charge to be made against the assessee out of the two limbs available in section 271(1)(c) of the Act. In the background of such schematic understanding of the operating mechanism of section 271(1)(c) of the Act, in our view, the initiation of penalty on one limb and its imposition ultimately on another limb cannot be sustained. Under these circumstances, in our view, the penalty imposed by the Assessing Officer in the present case on the ground of furnishing of inaccurate particulars of income is unsustainable for the reason that initiation was on another default i.e. concealment of particulars of income. Accordingly, we hold that the penalty imposed under section 271(1)(c) of the Act of Rs.39,029/- for assessment year 2005-06 is not sustainable and is hereby set-aside. Since we have set-aside the action of the Assessing Officer in consonance with the precedents referred above, we do not find it expedient to address the issue urged on merit of the penalty imposed. In conclusion, we set-aside the order of the CIT(A) and direct the Assessing Officer to delete the penalty imposed under section 271(1)(c) of the Act.

6. In the result, appeal of the assessee for assessment year 2005-06 is allowed, as above.

7. It was a common point between the parties that facts and circumstances leading to imposition of penalty under section 271(1)(c) of the Act in all other captioned assessment years i.e. assessment years 2006-07 to 2010-11 are *pari-materia* to those considered by us in ITA No. 1476/Mum/2014 for assessment year 2005-06, thus, our decision therein shall apply *mutatis mutandis* in the appeals for assessment years 2006-07 to 2010-11 also.

8. In the result, all the appeals of the assessee are allowed, as above.

Order pronounced in the open court on 21/10/2016

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

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

Mumbai, Dated 21/10/2016

Vm, Sr. PS

Copy of the Order forwarded to :

1. The Appellant ,
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai