

THE INCOME TAX APPELLATE TRIBUNAL
“SMC” Bench, Mumbai
Before Shri B.R. Baskaran (AM)

I.T.A. No. 104/Mum/2017 (Assessment Year 2009-10)

Gul Sukhdev Rochlani B/1, Bull Bush Bunglow Near Sapna Garden Sector-17, Ulhasnagar-3 PAN : AECPR9006F (Appellant)	Vs.	ACIT-2 A Wing, 6 th Floor Ashar I.T. Park Wagle Indl. Estate Thane-400 604. (Respondent)
---	-----	--

Assessee by	Dr. P. Daniel
Department by	Shri S.K. Bepari
Date of Hearing	14.9.2017
Date of Pronouncement	14.9.2017

O R D E R

The appeal of the assessee is directed against the order 13-10-2015 passed by Ld CIT(A)-3, Thane and it relates to the assessment year 2009-10. The assessee is aggrieved by the decision of Ld CIT(A) in confirming the penalty of Rs.6,00,378/- levied by the AO u/s 271(1)(c) of the Act.

2. The appeal is barred by limitation by 390 days. The assessee has filed an application requesting the bench to condone the delay. The Ld A.R submitted that the assessee is running computer coaching classes at Ulhasnagar. He should have filed appeal before the Tribunal by 12-01-2016, as the appellate order was received on 13.11.2015. However, the building at which the assessee was carrying on his activities was demolished by the Ulhasnagar Municipal Corporation on 04-12-2015. Due to this unexpected event, the assessee suffered heart attack on 10-12-2015 and he was admitted to a hospital. He has been repeatedly hospitalized due to various health complications and the same has led to the delay in filing appeal before the Tribunal. The Ld A.R submitted that the assessee has furnished copies of hospital bills and prescriptions to

substantiate his claim. The Ld A.R placed reliance on the decision rendered by Hon'ble Supreme Court in the case of Collector, Land Acquisition Vs. Mst. Katiji & Ors (167 ITR 471) and submitted that the technicalities should be ignored. He also placed reliance on the decision rendered by Hon'ble Supreme Court in the case of N.Balakrishnan Vs. M Krishnamurthy (AIR 1998 SC 3222).

3. I heard Ld D.R on this preliminary issue. Having regard to the submissions made by the assessee in his petition, I am of the view that there was reasonable cause for the assessee in filing this appeal belatedly. Accordingly I condone the delay and admit the appeal for hearing.

4. The facts that led to levy of penalty u/s 271(1)(c) of the Act is set out in brief. The assessee is conducting computer coaching classes. The AO noticed from AIR data that the assessee was having a bank account with Axis bank and the same has not been disclosed in the return of income. When asked, the assessee furnished copy of said bank account, where from it was noticed that the assessee has made cash deposit of Rs.17.50 lakhs and cheque deposit of Rs.3.00 lakhs. Before the AO, the assessee agreed for assessing above said deposits and accordingly the assessing officer added the above said amount of Rs.20.50 lakhs to the total income of the assessee. Thereafter he levied a penalty of Rs.6,00,378/- on the above said addition u/s 271(1)(c) of the Act and the same was also confirmed by Ld CIT(A). Aggrieved, the assessee has filed this appeal.

5. The Ld A.R raised a legal issue first. He submitted that the assessing officer did not apply his mind at all at the time of initiating penalty proceedings, i.e., he was not specific about the charge for which the penalty was levied. He also did not strike out the inapplicable portion in the notice issued and also did not specify the nature of charge in the penalty order. Accordingly he submitted

that the impugned penalty order is liable to be quashed on this legal ground alone. In support of his proposition, the Ld A.R placed reliance on the following decisions rendered by the co-ordinate benches:-

- (a) Savita Somchand Shah (ITA No.4197/Mum/2016 dated 17-04-17)
- (b) Banggreen Holdings P Ltd (ITA No.1999 & 2000/Mum/2014 dated 31.05.2017)
- (c) Dr. Sarita Milind Davare (ITA No.2187/Mum/2014 dated 21.12.2016)

6. On the contrary, the Id D.R supported the order passed by Ld CIT(A).

7. I heard the parties on this legal issue. In the assessment order, the assessing officer has stated that the penalty proceedings u/s 271(1)(c) of the Act is initiated for concealment of income. However in the notice issued, the AO did not strike off inapplicable portion. In the penalty order, in paragraph 6, the assessing officer has stated as under:-

“6. In view of the facts and circumstances of the case discussed above, I am satisfied that the assessee without any sufficient & reasonable cause has committed a default as defined in sec. 271(1)(c) of IT Act and has concealed income or furnishing inaccurate particulars of income to the tune of Rs.6,00,378/-. I, therefore, proceed to levy minimum penalty of Rs.6,00,378/- u/s 271(1)(c) of IT Act.”

It can be noticed that the AO has mentioned both the charges as an alternative to each other. All these factors cumulatively show that the AO has imposed penalty without application of mind.

8. In the case of Savta Somchand Shah (supra), the co-ordinate bench quashed the penalty order on the ground that the AO did not specify the specific charge. It was noticed that the AO has stated that “the penalty proceedings u/s 271(1)(c) of the Act is being initiated”, without specifying charge. Further the AO did not tick applicable portion in the penalty notice and in the penalty order,

the AO had used the expression "concealed or filed inaccurate particulars of income". Under these set of facts, the co-ordinate bench held that there was no application of mind on the part of the AO and accordingly quashed the penalty proceedings.

9. In the case of *Banggreen Holdings P Ltd (supra)*, the co-ordinate bench noticed that the Hon'ble Supreme Court has held in the case of *T.Ashok Pai (292 ITR 11)* and in the case of *Dilip N Shroff* that the two expressions, namely "concealment of particulars of income" and "furnishing of inaccurate particulars of income" have different connotations. It also noticed that the Hon'ble Supreme Court has observed in the case of *Dilip N Shroff* that the standard proforma used by the AO in issuing a notice has some significance and the non-striking off in applicable portion would show that the AO has not applied his mind. Accordingly the Co-ordinate bench has quashed the penalty order on the ground of non-application of mind.

10. Similar view was expressed by another co-ordinate bench in the case of *Dr. Sarita Milind Davare (supra)*.

11. In the instant case, I have already noticed that the assessing officer was not sure of the charge under which the impugned penalty was levied. Hence the impugned penalty order is liable to be quashed on the ground of non-application of mind. Accordingly I set aside the order passed by Ld CIT(A) and quash the penalty order.

12. On merits, the Ld A.R submitted that the assessee has offered entire amount of deposits as income in order to buy peace and avoid litigation. He submitted that the AO should have assessed only the income portion available in those deposits, which have primarily been generated through his business

activities. In this view of the matter, the question as to whether the entire deposits could be assessed as income would become debatable one and on that count, the impugned penalty is not leviable. Since the penalty order has been quashed on legal ground, I do not find it necessary to address the grounds urged on merits.

13. In the result, the appeal of the assessee is allowed.

Order has been pronounced in the Court on 14.9.2017.

Sd/-
(B.R.BASKARAN)
ACCOUNTANT MEMBER

Mumbai; Dated : 14/9/2017

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//

PS

BY ORDER,
(Dy./Asstt. Registrar)
ITAT, Mumbai