

आयकर अपीलीय अधिकरण] पुणे न्यायपीठ "बी" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

BEFORE MS. SUSHMA CHOWLA, JM AND
SHRI ANIL CHATURVEDI, AM

आयकर अपील सं / ITA No.1671/PUN/2015

निर्धारण वर्ष / Assessment Year : 2010-11

Jain Nilesh Shantilal,
Prop : Modern Jewellers,,
3A, New Bazar, M.G. Road,
Kirkee, Pune – 411003.

..... अपीलार्थी /
Appellant

PAN : AAQPJ2950C.

बनाम v/s

Dy Commissioner of Income Tax,
Circle – 8, Pune.

..... प्रत्यर्थी /
Respondent

Assessee by : Smt. Deepa Khare.

Revenue by : Shri Mukesh Jha.

सुनवाई की तारीख / Date of Hearing : 21.12.2017	घोषणा की तारीख / Date of Pronouncement: 07.02.2018
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आदेश / **ORDER**

PER ANIL CHATURVEDI, AM :

1. This appeal filed by the assessee is emanating out of the order of Commissioner of Income Tax (A) – 3, Pune dt.20.10.2015 for the assessment year 2010-11.

2. The relevant facts as culled out from the material on record are as under :-

2.1 Assessee is an individual and Proprietor of M/s. Modern Jewellers engaged in trading on Gold and Silver on retail basis. A

survey action u/s 133A of the Act was conducted in assessee's case on 09.10.2009. The assessee disclosed unaccounted income of Rs.90,00,000/- on account of excess stock of gold and silver. Assessee filed his return of income for A.Y. 2010-11 on 26.09.2011 declaring total income of Rs.98,55,990/- including the income disclosed during the course of survey. The case was taken up for scrutiny and thereafter assessment was framed u/s 143(3) of the Act vide order dt.28.12.2012 and the total income was determined at Rs.1,76,73,902/- wherein addition on account of under valuation of excess stock of gold (of Rs.66,88,392/-) silver (Rs.7,72,178/-), unaccounted debtors (Rs.3,49,480/-) and disallowance u/s 14A of the Act (Rs.7,861/-). Thus, disallowance aggregating to Rs.1,77,52,357/- was made. On the addition of Rs.74,60,570/- made on account of under valuation of excess stock of gold and silver and disallowance of Rs.3,49,480/- made on account of unaccounted debtors, AO vide order dt.27.06.2013 levied penalty of Rs.24,13,305/- u/s 271(1)(c) of the Act. Aggrieved by the penalty order of AO, assessee carried the matter before Ld.CIT(A), who vide order dt.20.10.2015 (in appeal No.PN/CIT(A)-3/DCIT Cir-8,Pn/788/2014-15) dismissed the appeal of the assessee. Aggrieved by the order of Ld.CIT(A), assessee is now in appeal before us, and has raised the following effective ground :

“The learned CIT-A erred on facts and in law in making penalty of Rs.24,13,305/- u/s 271(1)(c) of the Income Tax Act, 1961.”

3. Before us, Ld.A.R. reiterated the submissions made before AO and Ld.CIT(A) and further submitted that the addition made by the AO is basically on account of the valuation of stock. Assessee had

valued the stock on the basis of average basis which was the method being regularly followed by him since many years but the Department valued it on the basis of the market value. She submitted that to the extent the amount of undisclosed income on account of stock that has been accepted by the assessee in the return of income, no penalty has been levied but has only been levied on the difference of valuation. Ld.A.R. therefore submitted that the difference in valuation is on account of difference of opinion and in such cases, no penalty is leviable. She also placed reliance on the decision in the case of ACIT Vs. Ritesh Agrawal reported in [2014] 50 taxmann.com 93 (Indore Trib.). As far as the addition on account of unaccounted debtors is concerned she submitted that the amount was due from debtors but since assessee could not produce the debtors before AO, the assessee offered the balance of debtors as income. She further submitted that there is no furnishing of inaccurate particulars of income or concealment of income and therefore the penalty levied by the AO be deleted. She further submitted that while recording satisfaction in the assessment order AO has recorded that assessee has filed inaccurate particulars of income but in the penalty order passed u/s 271(1)(c) of the Act, AO has levied penalty on both the limbs namely filing of inaccurate particulars of income and concealment of income. She therefore relying on the decision of Hon'ble Bombay High Court in the case of CIT Vs. Samson Perinchery (ITA No.1154 of 2014 order dt.05.01.2017), submitted that no penalty is leviable. Ld.D.R. on the other hand, supported the order of lower authorities.

4. We have heard the rival submissions and perused the material on record. The issue in the present case is with respect to levy of penalty for inaccurate particulars of income and concealing the income.

5. In the present case, penalty has been levied for concealing the particulars of income and furnishing of inaccurate particulars of income. The perusal of assessment order passed u/s 143(3) of the Act reveals that AO had initiated penalty for furnishing of inaccurate particulars of income. Thereafter in the penalty order passed u/s 271(1)(c) of the Act, AO held that assessee had furnished inaccurate particulars of income and had concealed the income u/s 271(1)(c) of the Act. It is a settled law that while levying penalty for concealment, the AO has to record satisfaction and thereafter come to a finding in respect of one of the limbs, which is specified under section 271(1)(c) of the Act. The first step is to record satisfaction while completing the assessment as to whether the assessee had concealed its income or furnished inaccurate particulars of income. Thereafter, notice u/s 274 read with Section 271(1)(c) of the Act is to be issued to the assessee. The Assessing Officer thereafter has to levy penalty under Section 271(1)(c) of the Act for non-satisfaction of either of the limbs. While completing the assessment, the Assessing Officer has to come to a finding as to whether the assessee has concealed its income or furnished inaccurate particulars of income. The Hon'ble Bombay High Court in CIT Vs. Shri Samson Perinchery in ITA No.1154 of 2014 with other ITA Nos.953 of 2014, 1097 of 2014 and 1226 of 2014, vide judgment dated 05.01.2017 held that where

initiation of penalty is one limb and the levy of penalty is on other limb, then in the absence of proper show cause notice to the assessee, there is no merit in levy of penalty.

6. On the issue of levy of penalty of account of valuation of stock of gold and silver, the assessee's submission that the difference has arisen on account of methodology of valuation of stock and not on account of quantity difference has not been controverted by Revenue. More so, Revenue has not levied penalty on the amount of income offered by the assessee. In such a situation, we are of the view that the addition of account of difference of method of valuation, cannot be a ground for levy of penalty u/s 271(1)(c) of the Act and therefore we direct the deletion of penalty.

7. As far as the issue of penalty on addition on account of debtors is concerned, it is the submission of the assessee that since the assessee could not produce the debtors before AO, it had offered the amount representing the debtors as its income. The aforesaid submission of the assessee has not been found to be untrue / false. Further no material has been brought on record by Revenue that the debtors are bogus and further the Revenue has accepted the corresponding sales as income. Merely because the assessee has offered the debtors as income cannot be ground for levy of penalty u/s 271(1)(c) of the Act more so when it is a settled law that penalty proceedings and assessment proceedings are distinct and separate and that for levy of penalty, Revenue has to convincingly prove that there is concealment of income or furnishing of inaccurate particulars

of income. In the present case, the aforesaid requirement for levy of penalty is missing. In view of the aforesaid facts we are of the view that no penalty is leviable in the amount of debtors added as income.

Thus, the grounds of the assessee are allowed.

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

Order pronounced on 7th day of February, 2018.

Sd/-

(SUSHMA CHOWLA)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-

(ANIL CHATURVEDI)

लेखा सदस्य / ACCOUNTANT MEMBER

पुणे Pune; दिनांक Dated : 7th February, 2018.

Yamini

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. CIT(A)-3, Pune.
4. Pr. CIT-2, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" / DR,
ITAT, "B" Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER

// True Copy //

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune.