

आयकर अपीलिय अधिकरण "ए" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE

श्री डी. करुणाकरा राव, लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No.1243/PUN/2014
निर्धारण वर्ष / Assessment Year : 2006-07

Assistant Commissioner of Income Tax,
Central Circle – 1, Nashik

.....अपीलार्थी / Appellant

बनाम / V/s.

Smt. Madhuri Sunil Kotecha,
4, Vardhman Nagar,
Jalgaon – 425001

PAN : AHMPK6577H

.....प्रत्यर्थी / Respondent

Assessee by : Shri Hari Krishan
Revenue by : Shri Achal Sharma

सुनवाई की तारीख / Date of Hearing : 19-01-2018
घोषणा की तारीख / Date of Pronouncement : 28-03-2018

आदेश / ORDER

PER VIKAS AWASTHY, JM :

This appeal has been filed by the Revenue assailing the order of Commissioner of Income Tax (Appeals)-2, Nashik dated 19-03-2014, whereby the First Appellate Authority has deleted levy of penalty u/s. 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") for assessment year 2006-07.

2. The brief facts of the case as emanating from records are : The assessee filed its return of income for the impugned assessment year on 31-10-2006 declaring total income of Rs.35,57,230/-. The assessee claimed exemption of Rs.54,70,743/- u/s. 10 of the Act being Long Term Capital Gains (LTCG). The case of the assessee was selected for scrutiny on account of Long Term Capital Gains claimed on penny stock. Accordingly, statutory notice u/s. 143(2) was issued to the assessee on 06-03-2007. The assessee filed revised return of income offering the amount to tax claimed as exempt in the original return of income. The Assessing Officer initiated penalty proceedings u/s. 271(1)(c) in respect of LTCG claimed exempt in original return of income. Apart from above the Assessing Officer made addition of Rs.29,14,221/- in respect of Short Term Capital Gains arising in the case of minor son of the assessee and clubbed the same in the hands of assessee. The Assessing Officer vide order dated 30-03-2011 levied penalty for furnishing inaccurate particulars of income and concealment of income.

Aggrieved by the order levying penalty u/s. 271(1)(c) of the Act, the assessee filed appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) vide impugned order deleted levy of penalty by placing reliance on the decision of Hon'ble Supreme Court of India in the case of Commissioner of Income Tax Vs. Reliance Petroproducts (P) Ltd. reported as 322 ITR 158. Against the findings of Commissioner of Income Tax (Appeals) now, the Revenue is in appeal before the Tribunal.

3. Shri Achal Sharma representing the Department submitted that the additions made during assessment which are subject matter of penalty

proceedings were confirmed by Commissioner of Income Tax (Appeals) vide order dated 07-12-2009. There is nothing on record to show that the assessee had revised return of income suo-moto. The assessee had claimed deduction u/s. 10(32) on Long Term Capital Gains. It was only when notice u/s. 143(2) was issued to the assessee that the assessee vide letter dated 20-03-2007 offered to file revised return offering the amount to tax, initially claimed as exempt. The assessee in revised return offered the said amount under the head other source describing as "Income declared as undisclosed Investment" and paid tax thereon. This clearly indicates that the assessee was very well aware that the assessee has wrongly claimed the amount as exempt u/s. 10(32) of the Act. The assessee its return of income had deliberately furnished inaccurate particulars of income to reduce tax liability. It is a fit case for levy of penalty and the Assessing Officer has rightly levied penalty u/s. 271(1)(c) of the Act. The ld. DR pointed that the Commissioner of Income Tax (Appeals) has deleted penalty without appreciating the facts of the case. The assessee has failed to show any bonafide in making wrong claim in the original return of income. The ld. DR prayed for setting aside the order of Commissioner of Income Tax (Appeals).

4. On the other hand Shri Hari Krishan appearing on behalf of the assessee vehemently defended the order of Commissioner of Income Tax (Appeals) and prayed for dismissing the appeal of Revenue.

5. Notwithstanding his submissions on merits, the ld. AR pointed that there is defect in recording of satisfaction for levy of penalty and order levying penalty u/s. 271(1)(c) of the Act. The ld. AR filed an application under Rule 27 of the Income Tax Appellate Tribunal Rules, 1963 to raise

this legal ground. The ld. AR pointed that a perusal of assessment order would show that while recording satisfaction the Assessing Officer has merely stated that notice u/s. 271(1)(c) of the Act is being issued without specifying the limb for which penalty u/s. 271(1)(c) is being initiated. The assessee is therefore, in dark to defend the charge for which penalty is to be levied. While passing the order u/s. 271(1)(c) the Assessing Officer has mentioned both the limbs that is furnishing of inaccurate particulars of income and concealed the income. Thus, from the perusal of order levying penalty it is evident that the Assessing Officer is not clear in his mind as to under which limb of section 271(1)(c) of the Act, the penalty is to be levied.

6. The ld. DR raised strong objection to the fresh argument being raised by AR of assessee with respect to defect in limb. The ld. DR submitted that this argument of defect is being raised by assessee for the first time before Tribunal. No such ground was raised before Commissioner of Income Tax (Appeals) and the assessee has not filed any separate appeal or cross objections on this legal issue.

7. We have heard the submissions made by representatives of rival sides and have perused the orders of the authorities below. Before going to the merits of appeal by Revenue, we will first take up the legal ground raised by assessee challenging the validity of penalty proceedings in not specifying the charge for levy of penalty u/s. 271(1)(c) at the time of recording of satisfaction and thereafter, levying penalty u/s. 271(1)(c) for furnishing inaccurate particulars of income and also making reference to concealment of income. Undisputedly, the assessee has not raised this issue before the Commissioner of Income Tax (Appeals), nor this ground has been raised by assessee by filing appeal or cross objections before the

Tribunal. The assessee has raised this legal ground by filing application under Rule 27 of the Income Tax Appellate Tribunal Rules, 1963. An objection has been raised by the Department that the assessee cannot agitate this legal ground without filing appeal or cross objections, especially when no such ground was raised before the First Appellate Authority.

8. The Hon'ble Supreme Court of India in the case of National Thermal Power Co. Ltd. Vs. Commissioner of Income Tax reported as 229 ITR 383 has held that the Tribunal has jurisdiction to examine a question of law which arises from the facts as found by Income Tax authority and having a bearing on the tax liability of the assessee. However, the assessee has to raise such legal ground in the grounds of appeal or by raising additional grounds of appeal. Thus, it is a well settled proposition that legal grounds can be raised before the Tribunal for the first time, even if it has not been raised before the authorities below.

In the present case, it is in appeal by the Revenue that the assessee has raised a legal ground which goes to the root of validity of penalty proceedings initiated by the Assessing Officer. The Hon'ble Madras High Court in the case of Commissioner of Income Tax Vs. Smt. S. Vijayalakshmi reported as 242 ITR 46 has held that in order to consider a claim for relief during hearing before Tribunal, it is not necessary that there should be specific appeal or even a cross appeal by the assessee. In an appeal filed by Department the relevant facts are already on record, the Tribunal is not precluded from giving a finding on issue emanating from facts already on record and decide the issue in favour of the assessee even without an appeal or cross objections. For the sake of completeness it

would be relevant to refer to the question of law that was before the Hon'ble High Court for consideration :

"2. Whether the Tribunal was right in law in admitting the assessee's contention that the capital gains in the hands of the assessee should be taken as long-term capital gains in the course of the Department's appeal without her filing an appeal against the order of the AAC or a cross-objection?"

The Hon'ble High Court answered the above question in favour of the assessee-respondent as under :

"5. The Tribunal was not required to embark on an enquiry, which was outside the scope of the assessee's claim and the claim made by the assessee before the ITO was that the capital gain was a long-term capital gain. The facts required for examining the claim were before the Tribunal. The absence of an appeal by the assessee against the order of the AAC, who had remanded the matter to the ITO, did not in anyway preclude the Tribunal from holding that the capital gain in the instant case was a long-term capital gain. The ends of justice justify the Tribunal to grant the relief to the assessee even in the absence of a specific appeal or cross-appeal, if the facts available on record permit the grant of such relief and such relief had in fact been sought by the assessee before the assessing authority.

Similar proposition has been laid by the Hon'ble Bombay High Court in the case of B.R. Bamasi Vs. Commissioner of Income Tax reported as 83 ITR 223. Thus, in view of the judgments discussed above and the fact that legal ground raised by ld. AR of assessee is emanating from documents on record we are admitting the legal ground raised by assessee.

9. A perusal of the assessment order reveal that while recording satisfaction for levy of penalty u/s. 271(1)(c), the Assessing Officer has not specified any limb of section 271(1)(c) for which penalty proceedings are being initiated. The relevant extract of the assessment order where the Assessing Officer has recorded satisfaction is reproduced here-in-below :

"2.Notice u/s. 271(1)(c) of the I.T. Act, 1961 is being issued in respect of the long term capital gains claimed in the original return filed on 31-10-2006."

Thereafter, at the time of levy of penalty u/s. 271(1)(c) the Assessing Officer levied penalty by observing as under :

“12.Thus, the undersigned is satisfied that, the assessee has furnished inaccurate particulars of his income and thereby concealed the income to the extent of Rs.54,70,743/- & Rs.26,24,802/- on account of offering exempted Long Term Capital Gain as regular income and profit on the sale of shares treated as business income as against claimed as Short Term Capital Gain respectively.

13. From the foregoing discussion, it is clear that the assessee has concealed his income and therefore, this is a fit case for levy of penalty u/s. 271(1)(c) of the I.T. Act, 1961. Therefore, in the light of the above discussion, a penalty of Rs.27,24,960/- is levied as against maximum penalty leviable at Rs.81,74,880/-.”

The manner in which satisfaction has been recorded without specifying the charge and the perusal of order levying penalty clearly reveal that there was ambiguity in the mind of Assessing Officer at the time of recording satisfaction, as well as, at the time of passing of the order levying penalty. No limb of section 271(1)(c) i.e. whether the penalty is being initiated for ‘concealment of particulars of income’ or ‘furnishing inaccurate particulars of income’ has been mentioned while recording satisfaction. Whereas, at the time of passing of the order levying penalty the Assessing Officer has used both the expressions.

10. The Hon’ble Karnataka High Court in the case of Commissioner of Income Tax Vs. Manjunatha Cotton and Ginning Factory (supra) has held :

“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.”

Similar view has been taken by the Hon’ble Bombay High Court in the case of Commissioner of Income Tax Vs. Samson Perinchery reported as 392 ITR 4.

11. The Pune Bench of the Tribunal have been consistently deleting levy of penalty u/s. 271(1)(c) where there has been ambiguity in recording of satisfaction and levy of penalty. The charge for levy of penalty u/s. 271(1)(c) has to be specifically conveyed to the assessee at the time of recording satisfaction otherwise, the principles of natural justice are offended. The assessee should know the charge which he has to meet while defending his case for levy of penalty.

12. Thus, in view of facts of the instant case and the various case laws discussed above, we are of considered view that the penalty proceedings suffer from element of vagueness at the time of satisfaction, and also at the time of passing of the order levying penalty u/s. 271(1)(c) of the Act. Hence, the penalty proceedings are liable to be set aside.

13. Since, the assessee has succeeded on the legal issue and the penalty has been set aside, deliberating on the merits of appeal by Department would be merely an academic exercise. Accordingly, the appeal of Revenue is dismissed.

14. In the result, the appeal of Revenue is dismissed.

Order pronounced on Wednesday, the 28th day of March, 2018.

Sd/-	Sd/-
(डी. करुणाकरा राव/D. Karunakara Rao)	(विकास अवस्थी / Vikas Awasthy)
लेखा सदस्य / ACCOUNTANT MEMBER	न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 28th March, 2018

RK

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-2, Nashik
4. आयकर आयुक्त / The CIT-2, Nashik
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच,
पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

//सत्यापित प्रति // True Copy//

आदेशानुसार / BY ORDER,

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