

**IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI
BEFORE SHRI G.S.PANNU, AM AND SHRI RAVISH SOOD, JM**

ITA No.6851/Mum/2016
(निर्धारण वर्ष / Assessment Years:2009-10)

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| Gagandeep Singh Alag 5, Love Kush, Sindhi Society, Chembur, Mumbai-400071 | बनाम/ Vs. | Income Tax Officer-21(2)(1) Pratyaksha Kar Bhavan 505/C- 10, Bandra Kurla Complex, Bandra (East), Mumbai- 400051 |
| स्थायी लेखा सं./जीआइआर सं./PAN No. | | ADZPA6645F |
| (अपीलार्थी /Appellant) | : | (प्रत्यर्थी / Respondent) |

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| अपीलार्थी की ओर से / Appellant by | : | Shri Kisan Ghule, A.R |
| प्रत्यर्थी की ओर से / Respondent by | : | Shri Rajesh Kumar Yadav, D.R |

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| सुनवाई की तारीख / Date of Hearing | : | 19.03.2018 |
| घोषणा की तारीख / Date of Pronouncement | : | 30.05.2018 |

आदेश / ORDER

PER RAVISH SOOD, JUDICIAL MEMBER:

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-38, Mumbai, dated 25.07.2016, which in itself arises from the order passed by the A.O under Sec.271(1)(c) of the Income Tax Act, 1961 (for short 'Act') dated 24.03.2014 for A.Y 2009-10.

2. Briefly stated, the facts of the case are that the A.O on the basis of the AIR information gathered that the assessee had purchased an immovable property for a consideration of Rs.1,20,41,800/-. During the course of the assessment proceedings, the AO called upon the assessee to submit the

details of the aforesaid property. The assessee furnished with the A.O the assignment deed dated 29.12.2007, as per which the assignor had assigned 11.666% of his undivided share in land known as Mohammad Ali Usman Ali compound at Chembur in favour of Shri Amrik Singh A. Alag, Shri Amit S. Makan and Shri Gagandeep Singh Alag, each having a share of 40%, 30% and 30%, respectively. The aggregate price paid was Rs.15,30,100/- (including the registration charges of Rs.30,100/-). The assessee on being asked by the A.O to furnish the details of the source of his share of investment submitted that the entire payment of Rs.15,30,100/- was made by Shri Amrik Singh A. Alag and no contribution was made by the other two co-owners. However, the A.O was not persuaded to subscribe to the claim of the assessee and made an addition of Rs.4,59,000/- (i.e 30% of the share of the assessee in the total investment of Rs.15,30,100/-) to the income of the assessee under Sec. 56(2)(vii)(b) of the Act in the year under consideration, viz. A.Y 2009-10. The A.O while framing the assessment also initiated penalty proceedings under Sec. 271(1)(c) of the Act and issued a 'Show cause' notice, dated 31.12.2011 to the assessee.

3. Aggrieved, the assessee assailed the assessment order in appeal before the CIT(A). The CIT(A) being of the view that it was not a case of an outright transfer of any immovable property by Shri Amrik Singh A. Alag to the assessee, but a case where he had purchased the property and had made the payment for 30% share of the assessee, without requiring the assessee to reimburse the share of his investment. On the basis of his aforesaid deliberations, the CIT(A) sustained the addition, though not under Sec. 56(2)(vii), but under Sec. 56(2)(vi) of the Act.

4. After the culmination of the assessment proceedings, the assessee was called upon by the A.O to show cause as to why penalty under Sec.271(1)(c) may not be imposed on him. The A.O not finding favour with the explanation of the assessee imposed a penalty under Sec. 271(1)(c) of Rs.1,06,570/-. The assessee carried the matter in appeal before the CIT(A), who confirmed the penalty imposed by the AO under Sec.271(1)(c) and dismissed the appeal.

5. The assessee being aggrieved with the order of the CIT(A) had carried the matter in appeal before us. The Id. Authorized Representative (for short 'A.R') for the assessee had assailed before us the validity of the penalty imposed under Sec. 271(1)(c) on two grounds, viz. (i) the validity of jurisdiction assumed by the A.O for imposition of penalty under Sec.271(1)(c); and (ii) maintainability of the penalty under Sec.271(1)(c) on merits. The Id. A.R at the very outset of the hearing of the appeal submitted that as the deed of assignment was dated 29.12.2007 and pertained to the period relevant to A.Y 2008-09, thus no penalty under Sec. 271(1)(c) could have been imposed on the assessee during the A.Y 2009-10. Alternatively, it was submitted by the Id. A.R that even otherwise from a perusal of the 'Show cause' notice (for short 'SCN'), dated 30.12.2011 issued by the A.O under Sec.274 r.w.s. 271 of the Act, it was not discernible as to for which default the assessee was called upon to explain as to why penalty under Sec.271(1)(c) may not be imposed on him. The Id. A.R taking us through the copy of the 'SCN' at Page 38 of the 'Paper book' of the assessee (for short 'APB') submitted that the AO while issuing the notice had failed to strike off the irrelevant default, as a result whereof the assessee was not put to notice as regards the default for which he was being called upon to explain as to why penalty under the aforesaid statutory provision may not be imposed on him. Per contra, the Id. Departmental Representative (for short 'D.R') relied on the orders of the lower authorities.

7. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We find from a perusal of the assessment order that as observed by the A.O, the deed for assignment on the basis of which the assessee had acquired 30% share in the property was dated 29.12.2007. We thus, are of the considered view that now when the assignment deed itself pertains to the period relevant to A.Y 2008-09, hence by no means penalty under Sec. 271(1)(c) in respect of the *impugned* addition of Rs. 4,59,000/- made under Sec. 56(2)(vi) could have been imposed on the assessee in A.Y 2009-10. We find that as the assessee had not assailed the order passed by the CIT(A) in

quantum appeal, thus the same had attained finality. Be that as it may, not being oblivious of the fact that assessment and penalty proceedings are separate and distinct proceedings, we thus are of the considered view that now when the transaction in itself does not pertain to the year under consideration, hence no penalty under Sec. 271(1)(c) in respect of the same could have been imposed on the assessee. We thus in terms of our aforesaid observations quash the penalty of Rs. 1,06,570/- imposed by the A.O.

8. We have also perused the 'SCN', dated 30.12.2011, which was issued by the A.O under Sec.274 r.w.s. 271 of the Act. A perusal of the 'SCN' reveals that as the A.O had failed to strike off the irrelevant default, hence the assessee was not put to notice as regards the default for which he was called upon to explain as to why penalty under Sec.271(1)(c) may not be imposed on him. We are of the considered view that the non striking off the irrelevant charge in the 'Show cause' notice not only reflects the non application of mind by the A.O, but the same seriously defeats the very purpose of giving reasonable opportunity of hearing to the assessee as contemplated under Sec. 274. We find that the distinction between the said two defaults had been appreciated at length by the Hon'ble Supreme Court in its judgments passed in the case of Dilip & Shroff Vs. Jt. CIT (2007) 210 CTR (SC) 228 and T. Ashok Pai Vs. CIT (2007) 292 ITR 11 (SC), wherein the Hon'ble Apex Court had concluded that the two expressions namely 'Concealment of particulars of income' and 'furnishing of inaccurate of particulars' of income have different connotation. We further find that the High Court of Karnataka in the case of CIT Vs. SSA's Emerald Meadows (73 taxmann.com 241)(Kar), following its earlier order in the case of CIT Vs. Manjunatha Cotton and Ginning Factory (2013) 359 ITR 565 (Kar), had held that where the notice issued by the A.O under Sec. 274 r.w Sec. 271(1)(c) does not specify the limb of Sec. 271(1)(c) for which the penalty proceedings had been initiated, i.e whether for 'concealment of particulars of income' or 'furnishing of inaccurate particulars', the same had to held as bad in law. The 'Special Leave Petition' (SLP) filed by the revenue against the aforesaid order of the Hon'ble Karnataka High Court had thereafter been dismissed by

the Hon'ble Supreme Court in CIT Vs. SSA's Emerald Meadows (2016) 73 taxmann.com 248 (SC). We further find, that a similar view had also been taken by the Hon'ble High Court of Bombay in the case of CIT Vs. Samson Perinchery (ITA No. 1154 of 2014; Dt. 05.01.2017). The issue involved in the present case is also covered by the order of a coordinate bench of the Tribunal in the case of Meherjee Cassinath Holdings Pvt. Ltd. Vs. ACIT, Circle 4(2), Mumbai (ITA No. 2555/Mum/2012; dated 28.04.2017), wherein the Tribunal after deliberating at length on the issue under consideration in the backdrop of various judicial pronouncements, had concluded that the non-striking off the irrelevant charge in the notice clearly reflects the non application of mind by the A.O, and would resultantly render the order passed under Sec. 271(1)(c) as invalid and *void ab initio*. We thus, without prejudice to our observations on non-maintainability of the penalty imposed by the A.O under Sec. 271(1)(c) on merits, also vacate the same for the reason that even otherwise as he had failed to strike off the irrelevant default in the 'SCN' issued to the assessee, hence there is a clear absence of valid assumption of jurisdiction on his part. The order passed by the CIT(A) is set aside and penalty of Rs. 1,06,570/- imposed under Sec. 271(1)(c) is vacated.

9. The appeal of the assessee is allowed.

Order pronounced in the open court on 30/05/2018.

Sd/-
(G.S. Pannu)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक 30.05.2018
Ps. Rohit

Sd/-
(Ravish Sood)
JUDICIAL MEMBER

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)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,
उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai