

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH: 'E': NEW DELHI)**

**BEFORE SHRI G.D. AGRAWAL, HON'BLE PRESIDENT
&
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No:- 7173 /Del/2017,
(Assessment Year: 2012-13)**

Mayasheel Construction C/o Kapil Goel Adv. F-26/124 Sector 7 Rohini Delhi-110085	Vs.	DCIT Circle 1 Gaziabad.
PAN No: AAPFM5854R		
APPELLANT		RESPONDENT

Assessee by : Sh. Kapil Goel (Adv.)
Revenue by : Sh. B.R. Mishra (Sr. DR)

Date of Hearing : 22.05.2018.
Date of Pronouncement : 21/06/2018.

ORDER

PER: KULDIP SINGH, JM

The Appellant, Mayasheel Construction (hereinafter referred to as 'the Assessee') by filing the present appeal, sought to set aside the impugned order dated 29.09.2017 qua Assessment Year 2012-13 passed

by Ld. CIT(A) Ghaziabad, deleting the penalty levied under section 271(1)(c) of the Income-tax Act, 1961 (for short 'the Act'), on the grounds that:-

"1. *That on the facts and in the circumstances of the case and in law, Ld CIT-A erred in sustaining the penalty u/s 271(1)(c) of the Act amounting to Rs 68,77,152 as levied by Ld AO, in hands of appellant who is civil contractor, on basis of additions made in assessment order dated 25/03/2015 in turn founded on survey conducted on 11.09.2014 (during the course of ongoing scrutiny proceedings) and where assessee rapidly on 8/10/2014 and 3/12/2014 voluntarily and in good faith suo motto offered for taxation on estimation basis 8% of gross receipts as its income, which declaration of assessee became the final/concluding basis of assessment , so in such glaring facts, imposition of penalty u/s 271(1)(c) is out rightly bad and ex-facie unlawful.*

2. *That on the facts and in the circumstances of the case and in law, Ld CIT-A erred in sustaining the penalty u/s 271(1)(c) of the Act amounting to Rs 68,77,152 as levied by Ld AO, in hands of appellant who is civil contractor, on basis of invalid initiation of penalty proceedings in assessment order dated 25/03/2015 where no express and explicit finding is "discernible " from the body of the order;*

3. *That on the facts and in the circumstances of the case and in law, Ld CIT-A erred in sustaining the penalty u/s 271(1)(c) of the Act amounting to Rs 68,77,152 as levied by Ld AO, in hands of appellant who is civil contractor, on basis of vague and mechanical show cause notice issued u/s 274 of the Act which ground was duly raised in appeal memo in Form 35 before first appellate authority:*

4. *That on the facts and in the circumstances of the case and in law, Ld CIT-A erred in sustaining the penalty u/s 271(1)(c) of the Act amounting to Rs 68,77,152 as levied by Ld AO, in hands of appellant who is civil contractor, where onus on assessee has been discharged as evident from following:*

- a. *That assessee has given bonafide explanation;*
- b. *That there is no animus and active/conscious concealment on part of the assessee;*
- c. *that there is no contumacious conduct on part of the assessee.*
- d. *That addition made in assessment order does not conclusively represent income is really earned by assessee being estimated addition;*
- e. *Theory of equal hypothesis comes to rescue of assessee clearly;*
- f. *That no positive incriminating material is brought on records.*

5. That the appellant craves lead to add /alter any/all grounds of appeal before or at the time of hearing of the appeal."

2. Briefly stated the facts necessary for adjudication of the controversy at hand are: The Assessee firm is a Government Civil Contractor since its incorporation. On the basis of completed assessment u/s 143(3) of the Act at the income of Rs. 3,46,75,166/- making addition of Rs. 2,22,56,154/- after rejecting the books of accounts u/s 145(3) on estimated net profit @ 8%., the Assessing Officer initiated penalty proceeding by way of issuance of notice u/s 274 read with Section 271(1)(c) of the Act, but on failure of the assessee to appear, AO proceeded to hold that the assessee has furnished inaccurate particulars of income and thereby levied the penalty to the tune of Rs. 68,77,152/- @ 100%.

3. The Assessee carried the matter before the Ld. CIT(A) by filing the appeal, who has confirmed the penalty levied by AO by dismissing the appeal. Feeling aggrieved the assessee has come up before the Tribunal by way of filing the present appeal.

4. We have heard the Ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and

order passed by the revenue authorities below in the light of the facts and circumstances of the case.

5. Undisputedly, assessment framed in this case u/s 143(3) of the Act has been accepted by the assessee and has already paid tax together with interest on the assessed income. It is also not in dispute that during the survey proceeding, the assessee has made suo moto surrender without any condition which was also accepted by the AO. It is also not in dispute that the entire addition made in this case is on the basis of estimation of net profit by the AO.

6. The Ld. AR for the assessee company challenging the impugned order contended inter alia that show-cause notice issued by the AO u/s 274, available at page 4 of the Paper Book is not a valid notice to initiate the penalty proceedings as the assessee company has not been made aware if it has, "concealed the particulars of income or has furnished inaccurate particulars of such income", and relied upon the decision rendered by the Hon'ble Karnataka High Court in case of **CIT vs. Manjunatha Cotton and Ginning Factory & Ors. 359 ITR 565 (Karn.)**; that during

survey proceeding assessee has made suo moto surrender on the basis of which net profit @ 8% has been assessed by the AO, and in such cases penalty cannot be levied; and that AO while framing the assessment u/s 143(3) has not recorded specific satisfaction to initiate the penalty proceedings.

7. However, on the other hand, Ld. DR for the Revenue to repel the arguments addressed by the Ld. AR for the assessee company contended inter alia that the notice issued by the AO u/s 274 of the Act is not standalone documents which is based on assessment order; that the notice has been issued in respect of furnishing inaccurate particulars of income and relied upon the case of **Trimurti Engineering Works-25 taxmann.com 363.**

8. In the backdrop of the aforesaid facts and circumstances of the case, order passed by the Lower Revenue Authorities and arguments addressed by the Ld. AR of the parties to the appeal, the sole question arises for determination in this case is:-

"As to whether the assessee has concealed particulars of income or has furnished inaccurate particulars of such income during assessment proceedings while interpreting the provisions contained u/s 271(1)(c) of the Act?"

The show-cause notice issued by the AO u/s 274 to relates in the succeeding para is not a valid notice to initiate the penalty proceeding:

9. To decide the issue in controversy, we would like to reproduce notice issued u/s 271(1)(c) of the Act for ready perusal:-

To,

**M/s Mayasheel Construction
II-B-158, Nehru Nagar, Ghaziabad**

Sub:- Show cause notice U/s 271(1)(c) of Income Tax Act, 1961 for A.Y. 2012-13-regardin-

Notice u/s 271(1)(c) for the A.Y. 2012-13 was issued to you to show cause as to why a penalty be imposed. In reply to the above notice you have asked to keep the penalty proceedings in abeyance. Consequently, the penalty proceeding was kept in abeyance. Now, since the decision of the Ld. CIT(A) has been arrived, penalty proceedings cannot be kept in abeyance.

However, before passing an order, I would like to give one opportunity of being heard. You are, therefore, requested to attend in person or through authorized representatives in my office 15.02.2017 at 11.30AM and produce evidence in support of your contention. In case you do not wish to avail the opportunity of being heard, your written reply alongwith necessary evidence whatsoever may please be filed by the aforesaid date. In case the aforesaid explanation has already been sent, you are requested to give a copy thereof, which will be deemed proper compliance. Please note that if no compliance is made on the above date or your reply is without evidence, penalty proceedings will be finalized on merits of the case and on the basis of facts available on record."

Sd/-
(Meenu Singh Bist)
DY. Commissioner of Income Tax
Circle-1, Ghaziabad

10. Undisputedly, additions made against the assessee during the quantum proceedings have already been confirmed. It is settled principle of law that the penalty cannot be imposed merely on the ground that the additions made in the income of the assessee has been confirmed rather to proceed with imposition of penalty u/s 271(1)(c), the AO has to prove that there was concealment of particulars of income or assessee has furnished inaccurate particulars of such income.

11. First of all, perusal of para 5 of Assessment Order framed u/s 143(3) of the Act, goes to prove that the AO has not recorded his specific satisfaction to initiate penalty proceedings either for furnishing 'inaccurate particulars of income or for concealment of particulars of income' rather stated that initiate proceeding u/s 271(1)(c) of the Act separately. For ready perusal para 5 of the assessment order is extracted as under:-

" In view of the above discussion, the assessment is completed on income of Rs. 3,46,75,166/-. Issue notice of demand accordingly. Initiate proceedings u/s 271(1)(c) of the I.T. Act, is

being issued.”

12. From the assessment order itself it is proved on record that at the time of framing the assessment, AO was not clear nor he appears to have applied his mind as to whether penalty proceedings are to be initiated for concealment of particulars of income or for furnishing inaccurate particulars of such income, rather made a vague and ambiguous order to initiate penalty proceedings u/s 271(1)(c) of the Act.

13. Furthermore, bare perusal of the show-cause notice issued to the assessee u/s 271(1)(c) of the Act reproduced above, having reference of a show- cause notice u/s 271(1)(c) of the Act, without referring to any date, goes to prove that the assessee has not been called upon to explain if he has concealed the particulars of income or has furnished inaccurate particulars of such income rather he has simply been called upon show-cause as to why the penalty proceeding be not initiated.

14. Hon'ble Karnataka High Court ***in case of CIT vs. Manjunatha Cotton and Ginning Factory & Ors.*** (supra) dealt with the identical

issue threadbare and came to the following conclusion:-

"63. In the light of what is stated above, what emerges is as under:

- a) **Penalty under Section 271(I)(c) is a civil liability.**
- b) **Mens rea is not an essential element for imposing penalty for breach of civil obligations or liabilities.**
- c) **Willful concealment is not an essential ingredient for attracting civil liability.**
- d) **Existence of conditions stipulated in Section 271(I)(c) is a sine qua non for initiation of penalty proceedings under Section 271.**
- e) **The existence of such conditions should be discernible from the Assessment Order or order of the Appellate Authority or Revisional Authority.**
- f) **Ever if there is no specific finding regarding the existence of the conditions mentioned in Section 271(I)(c), at least the facts set out in Explanation 1(A) & (B) it should be discernible from the said order which would by a legal fiction constitute concealment because of deeming provision.**
- g) **Even if these conditions do not exist in the assessment order passed, at least, a direction to initiate proceedings under Section 271(I)(c) is a sine qua non for the Assessment Officer to initiate the proceedings because of the deeming provision contained in Section 1(B).**
- h) **The said deeming provisions are not applicable to the orders passed by the Commissioner of Appeals and the Commissioner.**
- i) **The imposition of penalty is not automatic.**
- j) **Imposition of penalty even if the tax liability is admitted is not automatic.**
- k) **Even if the assessee has not challenged the order of assessment levying tax and interest and has paid tax and interest that by itself would not be sufficient for the authorities either to initiate penalty proceedings or impose penalty, unless**

it is discernible from the assessment order that, it is on account of such unearthing or enquiry concluded by authorities it has resulted in payment of such tax or such tax liability came to be admitted and if not it would have escaped from tax net and as opined by the assessing officer in the assessment order.

l) Only when no explanation is offered or the explanation offered is found to be false or when the assessee fails to prove that the explanation offered is not bonafide, an order imposing penalty could be passed.

m) If the explanation offered, even though not substantiated by the assessee, but is found to be bonafide and all facts relating to the same and material to the computation of his total income have been disclosed by him, no penalty could be imposed.

n) The direction referred to in Explanation IB to Section 271 of the Act should be clear and without any ambiguity.

o) If the Assessing Officer has not recorded any satisfaction or has not issued any direction to initiate penalty proceedings, in appeal, if the appellate authority records satisfaction, then the penalty proceedings have to be initiated by the appellate authority and not the Assessing Authority.

p) Notice under Section 274 of the Act should specifically state the grounds mentioned in Section 271(1)(c), i.e., whether it is for concealment of income or for furnishing of incorrect particulars of income

q) Sending printed form where all the ground mentioned in Section 271 are mentioned would not satisfy requirement of law.

r) The assessee should know the grounds which he has to meet specifically. Otherwise, principles of natural justice is offended. On the basis of such proceedings, no penalty could be imposed to the assessee.

s) Taking up of penalty proceedings on one limb and finding the assessee guilty of another limb is bad in law.

t) The penalty proceedings are distinct from the assessment proceedings. The proceedings for imposition of penalty though

emanate from proceedings of assessment, it is independent and separate aspect of the proceedings.

u) The findings recorded in the assessment proceedings in so far as "concealment of income" and "furnishing of incorrect particulars " would not operate as res judicata in the penalty proceedings. It is open to the assessee to contest the said proceedings on merits. However, the validity of the assessment or reassessment in pursuance of which penalty is levied, cannot be the subject matter of penalty proceedings. The assessment or reassessment cannot be declared as invalid in the penalty proceedings."

15. So, following the law laid down by Hon'ble High Court, we are of the considered view that when the assessee has not been specifically made aware of the charges leveled against him, as to whether there is a 'concealment of income or furnishing of inaccurate particulars of income' on his part, the penalty u/s 271(l)(c) of the Act is not sustainable. The case law relied upon by the Ld. DR is not applicable to the facts and circumstances of this case in the face of the decisions rendered by the Hon'ble High Court in ***Manjunatha Cotton and Ginning Factory & Ors.*** (supra).

16. Next contention raised by Ld. AR for the assessee is that in case of suo moto surrender made by the assessee during survey proceeding on the basis of which net profit has been estimated no penalty can be imposed as assessee has not concealed any

particulars of income or has furnished inaccurate particulars of income. We are of the considered view that when assessee has made voluntary surrender of income and his books of accounts have been rejected by the AO, who has proceeded to estimate the net profit on the basis of voluntary surrender to the rate of 8%, there is no concealment of particulars of income or furnishing of inaccurate particulars of such income, on the part of the assessee, so as to initiate penalty proceeding against the assessee. Hon'ble Allahabad High Court in the case of **CIT vs. Radha Kishan Goel –(2005) 278 ITR 454 (All.)**, while deciding the identical issue as to levy penalty in case of voluntarily surrender has held as under:-

"From a perusal of Explan. 5 it is evident that in circumstances which otherwise did not attract the penalty provisions of s. 271(1)(c), a deeming provision was introduced as to attract the penalty provisions to those cases as well. But an exception in cl. (2) of Explan. 5 where the deeming provision will not apply if during the course of search the assessee makes the statement under sub-so (4) of s. 132 that the money, bullion, jewellery, etc., found in his possession has been acquired out of his income which has not been disclosed so far in his return of income to be furnished before the expiry of time specified in s. 139 and also specifies in the statement the manner in which such income has been derived and pays the tax together with interest, if any, in respect of such income. The exception appears to

be to provide an opportunity to the assessee to make a dean and fair confession and to surrender his income and also to deposit the tax and interest thereon which may result in an agreed assessment. The paramount intention appears to be that in the case of fair and clean confession and surrender of his income during the course of search further litigation may be avoided and the Revenue may get the tax and interest, etc., at an earliest and the assessee may be saved from further litigation. Under s. 132(4}, it is the authorized officer, who examines on oath any person, who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing, therefore, it is for the authorised officer to record the statement in his own way. Therefore, it is not expected from the person to state those things, which are not asked by the authorised officer. During the course of search person is so tortured, harassed and put to a mental agony that he loses his normal mental state Of mind and at that stage it cannot be expected from a person to preempt the statement required to be given in law as a part of his defence. Under s. 132(4}, unless the authorised officer puts a specific question with regard to the manner in which income has been derived, it is not expected from the person to make a statement in this regard and in case in the statement the manner in which income has been derived has not been stated but has been stated subsequently, that amounts to the compliance with Explan. 5(2). In case, there is nothing to the contrary in the statement recorded under s. 132 (4), in the absence of any specific statement about the manner in which such income has been derived, it can be inferred that such undisclosed income was derived from the business which he was carrying on or from other sources. The object of the provision is achieved by making the statement admitting the non-disclosure of money, bullion, jewellery, etc. Thus, much importance should not be attached to the statement about the manner in which such income has

been derived. It can be inferred on the facts and circumstances of the case, in the absence of anything to the contrary. Therefore, mere non-statement of the manner in which such income was derived would not make Explan. 5(2) inapplicable. For the reasons stated above, there is no error in the order of the Tribunal and the same is upheld. ”

17. Identical issue has also come up before Hon'ble Allahabad High court in the case of **Commissioner of Income Tax Kanpur vs. M/s Dee Control and Electric Pvt. Ltd. in ITA No. 82 of 2017 vide order dated 19.12.2017** wherein penalty was imposed on the basis of estimated net profit made by the AO after rejecting the books of accounts and decided the issue in favour of the assessee by returning the following findings:-

Having considered the arguments so advanced, we note neither the assessing officer gave any reason how the books of account etc. impounded during the survey brought out the fact of concealment of income nor he established how such books of account etc. rendered the regular books of account maintained by the assessee unworthy of acceptance. However, it is a fact that he rejected the regular books of account of the assessee. Rejection of books of account may arise in various circumstances. It is a matter having direct bearing in the quantum/assessment proceedings. It opens up the assessee to best judgment procedure i.e. estimation of income. At the same time estimation of income on best judgment basis does not automatically lead either to necessary additions to the assessed income or to, penalty proceedings under Section 271(1)(c) of the Act for concealment of income or for furnishing inaccurate particulars of income. These matters, by very nature depend on the facts of each case including evidence & material considered

adverse to the assessee and equally on the conclusions drawn by the assessing authority on the facts & evidence found existing.

Therefore, the assessing officer ought to have discharged this burden by making a specific allegation and by recording a necessary finding to that effect, necessarily based on reason on the basis of material and evidence found existing on record to establish that the assessee had concealed any particular of his income or had furnished inaccurate particulars of his income. In fact in the instant case as the assessment order itself disclosed, the assessing officer merely relied on the computation of income made by the assessee in the return itself. In this regard, it is seen in the assessment order itself the assessing authority had also recorded "It may be emphasized that nothing incriminating evidencing the unexplained expenses debited in the P & L Account during the year under consideration were found during the course of survey operation." Also, it was found that the audited balance sheets filed by the assessee with the banks and the Registrar of Companies tallied with those filed with the return.

Thus, the penalty order is silent as to reason/s how the assessing officer had concluded that the assessee had concealed its income & furnished inaccurate particulars of his income.

Then the fact that the assessee had offered to tax (by way of surrender) the income in respect of which penalty had been imposed is, in the facts of the present case, not decisive of the issue whether penalty had been validly imposed. In a given set of facts where some material & evidence is unearthed disclosing concealed income or in face of which the particulars of income disclosed by the assessee are declared inaccurate, it may be open to the assessing officer to draw such a conclusion if after issuance of a show cause notice and confronting the assessee with such material the assessee makes a surrender. However, such is not the case here. According to the assessing Officer himself (as per the assessment order) nothing incriminating was discovered during the survey. Then, if the assessing officer has relied on the self same material and also estimated the income of the assessee at virtually the same quantum as disclosed by the assessee.

The penalty order does not disclose any independent or other reasoning to prove the allegation of concealment of income and/or furnishing of inaccurate particulars of income. In fact, the assessing officer has not even made any distinction between the two contingencies. He had merely reiterated the language of the statute while concluding

that "the assessee has concealed its income and furnished inaccurate particulars of its income without giving reasoning to establish either of the two conditions that may invite imposition of penalty under Section 271(1)(c) of the Act.

*In this regard, we find the Gujarat High Court had in the case of **CIT Vs. Manu Engineering Works (supra)** held as under:-*

"We find from the order of the IAC, in the penalty proceedings, that is, the final conclusion as expressed in paragraph 4 of the order:

"I am of the opinion that it will have to be said that the assessee had concealed its income and/or that it had furnished inaccurate particulars of such income". Now, the language of "and/or" may be proper in using a notice as to penalty order or framing of charge in a criminal case or a quasi criminal case, but it was incumbent upon the IAC to come to a positive finding as to whether there was concealment of income by the assessee or whether any inaccurate particulars of such income had been furnished by the assessee. No such clear-cut finding was reached by the IAC was liable to be struck down". "

Normally, it does appear that penalty under Section 271(1)(c) may be imposed either if the assessee had concealed the particulars of his income or it had furnished inaccurate particulars of its income. In either situation penal provisions would get attracted if there has been a failure of duty, created by the Act or the Rules framed thereunder to fully and truly disclose the particulars of the income. In case the assessing officer alleged 'concealment' of such particulars it would have to be alleged and established as a fact that the assessee actively did not disclose such particulars. Similarly, in case the assessing officer alleged furnishing of inaccurate particulars of income he would have to establish which particular of income furnished was inaccurate that had that had a material bearing on determination/assessment of the true income of the assessee. In absence of any factual allegation in that regard it is difficult to sustain the submissions made by learned counsel for the revenue that the

assessee had concealed particulars of his income or that he had furnished inaccurate particulars of his income. There can be no presumption as to fact of infraction of law committed by the assessee.

Again, though as a possibility, it may not be denied that in a given set of facts the assessing officer may be able to successfully allege and establish that the assessee both 'concealment of particulars of income' and also 'furnished inaccurate particulars of income' but again these are contingencies or fact circumstance that must be alleged and found to be existing, simultaneously. There can be no presumption as to their co-existence or even existence of one of the two contingencies or infringements.

In the present case, the assessing officer has not given any reason as to how he reached the conclusion that "the assessee has concealed it's income and furnished inaccurate particulars of it's income". Merely because, the books of account had been rejected it did not in itself establish or prove either of the two circumstance to levy penalty," leave 'alone'" both circumstances as the penalty order suggests. The assessing officer, was obliged to reason and state in the penalty order how according to him the assessee had either concealed the particulars of his income or had furnished inaccurate particulars of the same either with reference to the material discovered during the survey proceedings or otherwise.

In view of the peculiar facts of this case where the Assessing Officer had not given any cogent reason in support of conclusion drawn by him to impose penalty, the Tribunal has correctly deleted the penalty relying on the earlier division bench judgement of this Court that rejection of books of account did not automatically lead to the conclusion of concealment or submission of inaccurate particulars of income."

18. In view of what has been discussed above, we are of the considered view that the Assessing Officer has failed to make out his case by proving on record that the assessee has concealed particulars of income or has furnished inaccurate

particulars of such income, rather proceeded to levy the penalty merely on the basis of addition made by the Assessing Officer while framing u/s 143(3) on the basis of estimated net profit of 8% by rejecting the books of accounts. So, we find that penalty levied by the AO and confirmed by the Ld. CIT(A) is not sustainable, hence ordered to be deleted, consequently, appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 21/6/2018

Sd/-

(G.D. AGRAWAL)
PRESIDENT

Sd/-

(KULDIP SINGH)
JUDICIAL MEMBER

Dated: 21 .06.2018
Pooja/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT NEW DELHI

Date of dictation	8/6/2018
Date on which the typed draft is placed before the dictating Member	18,19,20/6/2018
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	21/6/2018
Date on which the fair order is placed before the Dictating Member for pronouncement	21/6/2018
Date on which the fair order comes back to the Sr. PS/PS	22/6/2018
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	