

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI "I" BENCH, MUMBAI**

**BEFORE SHRI SAKTIJIT DEY, HON'BLE JUDICIAL MEMBER &
SHRI Dr. A.L. SAINI, HON'BLE ACCOUNTANT MEMBER**

**ITA No. 4960/MUM/2016
(Asst. Year: 2011-12)**

ITO-17(3)(3),
Aayakar Bhavan, Room No.
123, 1st Floor, M.K. Road,
Mumbai -400 020

vs. Shree Mangal Associates,
802B, 8th Floor, Grande
Palladium, Near Mercedes
Showroom, 175, CST Road,
Kalina, Santacruz (E),
Mumbai - 400 098

PAN No. ABIFS 0355 B
(Appellant)

(Respondent)

C.O.No. 292/MUM/2017
(Arising out of ITA No. 4960/MUM/2016)
(Asst. Year : 2011-12)

Shree Mangal Associates,
802B, 8th Floor, Grande
Palladium, Near Mercedes
Showroom, 175, CST
Road, Kalina, Santacruz
(E), Mumbai - 400 098

vs. ITO-17(3)(3),
Aayakar Bhavan, Room No.
123, 1st Floor, M.K. Road,
Mumbai - 400 020.

PAN No. ABIFS 0355 B
(Appellant)

(Respondent)

Assessee by : Shri Madhur Agarwal, Adv.
Department By : Shri Saurabh Kumar Rai, DR

Date of hearing : 27/06/2018.
Date of pronouncement : 20/07/2018.

ORDER**PER Dr. A.L. SAINI, ACCOUNTANT MEMBER**

The captioned appeal filed by the Revenue and the Cross Objections filed by the assessee, pertaining to Assessment Year 2011-12, are directed against the order passed by the Id. CIT(A)-28, Mumbai in appeal No. CIT(A)/-28/IT-242/ITO-12(3)(2)/2014-15, dated 16/05/2016, which in turn arises out of a penalty order passed by the Assessing Officer under section 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as the "Act").

2. Since the appeal filed by the Revenue and the Cross Objections filed by the assessee relate to the same assessee, same assessment year and identical issues are involved, therefore, these have been clubbed and heard together and a consolidated order is being passed for the sake of conveniences and brevity.

3. At the outset, we find that the Cross Objection filed by the assessee is delayed by 05 days and the assessee has filed condonation petition praying for condonation of delay. We heard the parties on this preliminary issue, and having regard the

reasons given in the petition,we condone the delay and admit the Cross Objections for hearing.

4. However, in this appeal, the Revenue has raised a multiple grounds of appeal, but at the time of hearing, the main grievance of the Revenue has been confined to the issue that the Id. CIT(A) has erred in deleting penalty under sec. 271(1)(c) of the Act partly and in directing to AO to delete the penalty levied under sec. 271(1)(c) of the Act in respect of Rs. 50,28,374/-being other interest income and Rs. 6,53,537/- as FDR interest aggregating to Rs. 56,81,911/-

5. On the other hand, the main grievance of the assessee in his original cross objection and additional grounds of cross objections are that the Id. CIT(A) has erred in upholding the order passed by the Assessing Officer under section 271(1)(c) of the Act in respect of addition on account of interest of Rs. 37,71,024/-, as the assessee has offered the said interest income in assessment year 2012-13, and moreover, there is no specific charge mentioned in the penalty order, therefore, penalty should not be levied.

6.The facts of the case which can be stated quite shortly are as follows: During the course of assessment proceedings, the Assessing Officer, on verification of profit & loss account found that the assessee has received interest income of Rs. 50,28,374/- and interest on FDRs of Rs. 6,53,537/-. The assessee was requested to submit copy of 26AS (Traces). On verification the AO noted that the assessee has received interest of Rs. 87,08,521/-. The TDS deducted on this amount was to the tune Rs. 8,70,851/-. However, the interest income of Rs. 37,71,024/- received from M/s. Bau Developer P. Ltd. has not been offered for taxation during this year. The assessee was issued show cause notice in respect of the interest amount of Rs. 37,71,024/- as to why this amount should not be added as his undisclosed income. The assessee vide letter dated 19/03/2014 has explained that the interest income of Rs. 37,71,024/- reflected in 26AS statement received from M/s. Bau Developer P. Ltd, is offered for taxation in the financial year 2011-12 i.e. Assessment Year 2012-13.

However, the assessing officer rejected the contention of the assessee and made addition of Rs. 37,71,024/- in the total income of the assessee as his undisclosed income under sec. 68 of the Act and Penalty proceedings under sec. 271(1)(c) were

initiated separately for concealment of total income and/or filing inaccurate particulars of income.

7.On verification of computation of income filed by the assessee, it was noted by the Id. AO that the assessee has considered FDR interest income of Rs. 6,53,537/- as well as income of Rs. 50,28,374/- for computation of deduction under section 80IB of the Act. However, as per AO, since these incomes were not pertaining to the business of the assessee, hence the assessee was not eligible for claiming deduction under section 80IB of the Act. Accordingly, the FDR interest income of Rs. 6,53,537/- and interest income of Rs.50,28,374/- were disallowed in section 80IB computation and was added back to the taxable income of the assessee. Penalty proceedings under sec. 271(1)(c) were initiated for filing inaccurate particulars of income.

The Id. assessing officer further noted that had this case not been selected for scrutiny, the interest income shown in the profit & loss account would have been accepted as business income instead of income from other sources under sec. 143(1) of the Act, thereby the assessee would have evaded payment of tax. Based on the reasons mentioned above, the Assessing Officer levied penalty to the tune of Rs. 29,20,956/-.

8. Aggrieved by the penalty order passed by the Assessing Officer, the assessee carried the matter in appeal before the Id. CIT(A), who has deleted the penalty partly. The Id. CIT(A) noted that in respect of other interest income duly disclosed in the financial statement to the tune of Rs. 56,81,911/-. The assessee claimed this interest as eligible for deduction under sec. 80IB and the fact that earning of interest has been disclosed by the assessee. Therefore Id. CIT(A) relying on the decision of the Hon`ble ITAT, Mumbai in Roborant Investments Pvt. Ltd. (7 SOT 181) (Mumbai) held that the assessee having disclosed the particulars of his interest income in the financial statements had made a full disclosure. The claim of the assessee that the interest also qualifies for a deduction under sec. 80IB did not stand the scrutiny of the Assessing Officer, however, mere making of this claim cannot lead to penalty automatically. Therefore Id. CIT(A) deleted the penalty U/s 271(1)(c) in respect of the addition of Rs. 56,81,911/- made by the Assessing Officer towards interest income not eligible for deduction under sec. 80IB of the Act.

9. Aggrieved by the order passed by the Id. CIT(A), the Revenue is in appeal and the assessee is in Cross Objection before this Tribunal.

10. Learned counsel for the assessee begins by pointing out that the Assessing Officer has not recorded any satisfaction while imposing penalty. Notice under sec. 271(1)(c) is a defective notice and it is not certain whether the penalty is initiated on account of 'concealment of income' or 'furnishing of inaccurate' particulars of income. The Ld. counsel further pointed out that non-striking of irrelevant portion of the penalty order reflects non-application of mind on the part of the Assessing Officer and the Assessing Officer himself was not sure about the limb/exact charge for which the assessee was being penalised which is evident from the fact that the relevant limb of the penalty has not been ticked and the irrelevant limb has not been strike off.

Since, the relevant limb of the charge has not been ticked and the irrelevant portion has not been strike off, therefore, the assessee does not know about the charge, hence, initiation of penalty against the assessee is bad in law. For that, assessee has relied on the judgment of the Hon'ble Bombay High Court in the case of

the *CIT vs. Samson Perinchery*[(2017) 392 ITR 4 (Bom.)], wherein it was held as under:-

"6. The impugned order of the Tribunal deleted the penalty imposed upon the Respondent-Assessee. This by holding that the initiation of penalty under Section 271 (l)(c) of the Act by Assessing Officer was for furnishing inaccurate particulars of income while the order imposing penalty is for concealment of income. The impugned order holds that the concealment of income and furnishing inaccurate particulars of income carry different connotations. Therefore, the Assessing Officer should be clear as to which of the two limbs under which penalty is imposable, has been contravened or indicate that both have been about blank contravened while initiating penalty proceedings. It cannot be that the initiation would be only on one limb i.e. for furnishing inaccurate particulars of income while imposition of penalty on the other limb i.e. concealment of income. Further, the Tribunal also noted that notice issued under Section 274 of the Act is in a standard proforma, without having striked out irrelevant clauses therein. This indicates non- application of mind on the part of the Assessing Officer while issuing the penalty notice."

11.The Counsel further stated that the assessee, vide letter dated 19/03/2014 had explained to AO that the interest income of Rs. 37,71,024/- reflected in 26AS statement received from M/s. Bau Developer P. Ltd, is offered for taxation in the financial year 2011-12 i.e. Assessment Year 2012-13. The date of booking of the transaction in respect of M/s. Bau Developer P. Ltd is on 01.08.2011 (vide pb 11), which falls in assessment year 2012-13,

therefore, the assessee has rightly offered interest income of Rs. 37,71,024/-for taxation in the Assessment Year 2012-13.

12. The Id Counsel also submitted that the interest amounting to Rs. 56,81,911/-was eligible for deduction under section 80IB of the Act and the assessee had disclosed the fact of earning said interest in the financial statements. Since the assessee had made full disclosure in respect of interest to the tune of Rs. 56,81,911/-, and therefore, Id CIT(A) has rightly deleted the penalty U/s 271(1)(c) of the Act.

The Id. Counsel prayed the Bench that penalty under section 271(1) (c) of the Act in respect of interest income of Rs. 37,71,024/- should also be deleted, as the assessee has offered the said amount for taxation in A.Y. 2012-13.

13. On the other hand, Id. Departmental Representative for the Revenue has submitted that there is a concealment of income on the part of the assessee. The assessee has not disclosed the interest on FDR and interest income received from M/s. Bau Developer P. Ltd. to the tune of Rs. 37,71,024/-, which is reflected

in 26AS. Had the assessee's case not been selected for scrutiny, the interest shown in the profit & loss account would have escaped from assessment. The Id DR stated that the requirement of section 274, read with section 271 (1) (c) of the Income Tax Act for granting reasonable opportunity of being heard in the matter cannot be stretched to the extent of framing a specific charge or asking the assessee an explanation in respect of the quantum of penalty proposed to be imposed. The assessee was supplied with the findings recorded in the order of assessment. The assessee had sufficient notice of the action of imposing penalty. The AO has to satisfy whether the penalty proceedings be initiated or not during the course of the assessment proceedings and the AO is not required to record his satisfaction in a particular manner or reduce it into writing. In addition to this the Ld. Departmental Representative for the Revenue, to support his plea, relied on the following judgment:-

- 1) CIT vs.L. Vishnudas [(2014) 50 taxmann.com 314 (Kerala), wherein it has been held as under:-

"10. Though we are not required to enquire into mens rea or willful intention on the part of the assessee, we cannot close our eyes to the categorical declarations made by the assessee at the time of filing the return. In the light of the categorical statement that the entire income from the HUF was included in

the individual income of the assessee which apparently was far from truth, we only have to opine that there was no honest and bona fide disclosure made by the respondent at the time of filing the return of income. On the other hand, but for the scrutiny taken up by the Department, the additional income from the HUF would have gone unnoticed and it would have escaped from computation of tax.

11. In the light of above observations, it is clear that what happened subsequent to February 6, 1998, though not crucial, the appellate authorities have placed much reliance on subsequent events than the categorical declaration in return of income on February 6, 1998. The criterion is not the contents of the letter dated February 23, 1998, nor the revised return filed in response to the scrutiny notice. The criterion in this case is categorical declaration made by the assessee at the time of submission of returns. The categorical statement with reference to the above reasoning clearly indicates there is concealment of income from the HUF, i.e., knowingly the assessee furnished inaccurate particulars of income for computation of tax."

In addition to this, Id. DR for the Revenue also submitted that Id CIT(A) deleted the penalty U/s 271(1) (c) of the Act, in respect of other interest income of Rs. 56,81,911/- without considering the facts in right perspective. The assessee had made wrong claim, therefore, the penalty should be levied.

14. We have given a careful consideration to the rival submissions and perused the material available on record. We note that the penalty imposed under section 271 (1) (c) of the Act, in respect of other interest income of Rs. 56,81,911/-, which has been deleted by the Id CIT(A), as the said amount was duly

disclosed in the financial statement by the assessee. There was a claim by the assessee that said interest income of Rs. 56,81,911/- was eligible for deduction under section 80IB of the Act, and the assessee had disclosed the fact of earning said interest in the financial statements. We note that the assessee has disclosed the particulars of his income in the financial statements and has made full disclosure, in respect of other interest income of Rs.56,81,911/- hence, there is neither 'concealment of income' nor 'furnishing inaccurate particulars of income'. We note that mere making of this claim cannot lead to penalty automatically. Therefore, Id. CIT(A) has rightly deleted the penalty U/s271 (1) (c) of the Act, in respect of addition of Rs. 56,81,911/-.

15. We note that the assessee, vide letter dated 19/03/2014, had explained to AO that the interest income of Rs. 37,71,024/- reflected in 26AS statement, was received from M/s. Bau Developer P. Ltd, and had been offered for taxation by the assessee, in the Assessment Year 2012-13. We note that the date of booking of the transaction in respect of M/s. Bau Developer P. Ltd is on 01.08.2011 (vide pb 11), which falls in assessment year 2012-13, therefore, the assessee has offered interest income of

Rs. 37,71,024/-for taxation in the Assessment Year 2012-13.Since the assessee has offered the said income for taxation in the A.Y.2012-13, hence there is no concealment.Based on these factswe note that there is neither 'concealment of income' nor 'inaccurate particulars of income' and hence we are of the view that there is no any scope to impose the penalty on the assessee under consideration, as the assessee has disclosed the right income in the right assessment year.

16. We have also perused the notice issued u/s 274, read with 271 (1) (c) of the Act and the relevant para reads as under:

"Have concealed the particulars of your income or Furnished inaccurate particulars of such income"

At the time of hearing, the Ld. Counsel for the assessee drew our attention to the notices u/s. 274 of the Act r.w.s. 271 (1) (c) of the Act dated 20.04.2013, and served on the assessee, wherein we note that the AO has not ticked the limb of charge/default for which the penalty is being initiated against the assessee. We find that the notice has been issued for "having concealed the particulars of income or furnished inaccurate particulars of such income". But no any particular limb has been struck off or ticked by assessing officer. We note that in a similar case the Hon'ble High court of Karnataka in the case of CIT vs Manjunatha Cotton and Ginning Factory reported in (2013) 359 ITR 565 (Kar) has

cancelled the penalty taking note of the fact that the penalty notice did not spell out clearly as to whether the assessee has concealed the particulars of income or has furnished inaccurate particulars of Income. We also find that Hon'ble Karnataka High Court in the case of CIT Vs. SSA's Emerald Meadows, reported in (2016) 73 taxmann.com 241 (Kar) endorsed the same view in Manjunatha Cotton and Ginning Factory (supra) and held as under:

"3. The Tribunal has allowed the appeal filed by the assessee holding the notice issued by the Assessing Officer under section 274 read with Section 271(1)(c) of the Income Tax Act, 1961 (for short 'the Act'), to be bad in law as it did not specify which limb of Section 271(1)(c) of the Act, the penalty proceedings had been initiated i.e., whether for concealment of particulars of income or furnishing of inaccurate particulars of income. The Tribunal, while allowing the appeal of the assessee, has relied on the decision of the Division Bench of this Court rendered in the case of CIT Vs. Manjunatha Cotton & Ginning Factory (2013) 359 ITR 565/218 Taxman 423/35 taxmann.com 250(Kar).

4. In our view, since the matter is covered by judgment of the Division Bench of this Court, we are of the opinion, no substantial question of law arises in this appeal for determination by this Court. The appeal is accordingly dismissed."

We also find that the aforesaid order of the Hon'ble High Court was challenged by the department before the Hon'ble Supreme Court by preferring an SLP which has been dismissed which fact has been reported in CIT Vs. SSA's Emerald Meadows (2016) 73 taxmann.com 248 (SC).

17. We note that case law relied on by the Id DR for the Revenue is distinguishable on facts, in the case law relied on by the Id. DR there was no honest and bona fide disclosure made by the respondent at the time of filing the return of income, whereas in the assessee`s case under consideration the assessee has offered the interest income received from M/s Bau Developers Private Limited in assessment Year 2012-13 and hence there is no concealment of income. Hence, none of the case law relied on by the Id DR is applicable to the assessee under consideration.

18. We note that since the penalty notice issued to the assessee dated 20.04.2013 did not spell out as to which default the assessee has committed for which penalty u/s. 271(1)(c) of the Act has been initiated, therefore, respectfully following the Hon'ble Karnataka High Court's order in Manjunatha Cotton & Ginning Factory (supra) and SSA's Emerald Meadows and judgment of the Hon'ble Bombay High Court in the case of the *CIT vs. Samson Perinchery* [(2017) 392 ITR 4 (Bom.) (supra), we cancel the penalty imposed by the AO which has been erroneously confirmed

by the Id. CIT(A), partly. Therefore, the appeal of the Revenue is dismissed and cross objections raised by the assessee are allowed.

19. In the result, the appeal of Revenue is dismissed and cross objections filed by the assessee are allowed.

Order Pronounced in open Court on this day of 20th July, 2018.

(SAKTIJIT DEY)
Judicial Member

(A.L. SAINI)
Accountant Member

Dated : 20th July, 2018.

vr/-

Copy to:

1. *The Assessee - Shree Mangal Associates, 802B, 8th Floor, Grande Palladium, Near Mercedes Showroom, 175, CST Road, Kalina, Santacruz (E), Mumbai - 400 098*
2. *The Revenue - ITO-17(3)(3), Aayakar Bhavan, Room No. 123, 1st Floor, M.K. Road, Mumbai -20*
3. *The Pr.CIT-17, Mumbai.*
4. *The CIT(A)-28, Mumbai.*
5. *The D.R., Mumbai.*
6. *Guard file.*

By order

Dy./Asst. Registrar,
ITAT, Mumbai.