

आयकर अपीलिय अधिकरण "C" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री जी. मंजुनाथ लेखा सदस्य के समक्ष ।

BEFORE SRI MAHAVIR SINGH, JM AND SRI G MANJUNATHA, AM

आयकर अपील सं./ ITA No. 4321/Mum/2013

(निर्धारण वर्ष / Assessment Year 2008-09)

The Asst. Commissioner of Income Tax, Circle-25(1), C-111, Pratyakshakar Bhavan, R.No.2 02, Bandra Kurla Complex, Bandra East, Mumbai-400 051	Vs.	M/s Chirag Construction Co. 105, Gopal Puri, S.V. Road, Borivali (W), Mumbai
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
स्थायी लेखा सं./PAN No. AACFC7646N		

अपीलार्थी की ओर से / **Appellant by** : Shri Virender Singh, DR

प्रत्यर्थी की ओर से / **Respondent by** : Miss Pritama Pokhrana, AR

सुनवाई की तारीख / Date of hearing:	31-05-2018
घोषणा की तारीख / Date of pronouncement :	15-06-2018

आदेश / ORDER

PER MAHAVIR SINGH, JM:

This appeal by the Revenue is arising out of the order of Commissioner of Income Tax (Appeals)-35, Mumbai [in short CIT(A)], in appeal No. CIT(A)-35/ACIT25(1)/ITA.96/11-12 dated 25.03.2013. The Assessment was framed by the Asst. Commissioner of Income Tax, 25(1),



Mumbai (in short 'ACIT'/ AO) for the A.Y. 2008-09 vide order dated 30.12.2010 under section 143(3) read with section 147 of the Income Tax Act, 1961 (hereinafter 'the Act'). the penalty under section 271(1)(c)(1) (C) of the Act was levied by the ACIT-25(1), Mumbai, vide his order dated 27.06.2011.

2. The only issue in this appeal of Revenue is against the order of CIT(A) deleting the penalty levied by AO under section 271(1)(c) of the Act on the ground that the additional income disclosed by the assessee by following revised return on the basis of statement recorded during the course of survey under section 133A of the Act has no evidenciary value. For this has raised the following grounds: -

“(i) On the facts and in the circumstances of the case, and in law, the Ld. CIT (A) is erred in deleting the penalty of Rs 16.97,515/u/s 271(l)(c) on the ground that the additional income disclosed by the assessee by filing revised return on the basis of statement recorded during survey has no evidenciary value while the assessee has admitted undisclosed income during survey in his statement and filed revised return and surrendered income of ₹ 49,94,154/-”

(ii) Whether Id. CIT (A) erred in ignoring the corroboratory value of statement recorded during survey while finalizing the assessment as held by the Hon'ble Kerala High Court in the case of CIT vs Hotel Samrat 323 ITR 353(Ker.).”

(iii) Whether Ld. CIT (A) erred in holding that there is no mensrea while admitting undisclosed income during the survey and offered for taxation by filing revised return as to prove mensrea is no



longer required while levying penalty u/s 271(1)(c) of the I.T. Act."

3. Briefly stated facts are that the assessee is a civil contractor. A survey under section 133A of the Act was carried out on the business premises of the assessee on 17.03.2008, by virtue of which assessee declared an additional income of ₹ 125 lakhs. The said declaration comprises of ₹ 1,10,00,000/- on account of Site and labour charges, ₹ 7,01,000/- on account of excess cash found and ₹ 8,00,000/- on account of another discrepancy to cover up omissions. Subsequently, another survey was carried out under section 133A of the Act by the ADIT (Investigation), Unit III(3), Mumbai on 25-08-2009 and by virtue of which the assessee offered additional income of ₹ 49,94,0159/-. This additional income offered comprises of unproved expenses of ₹ 42,51,500/- and unproved labour charges of ₹ 7,42,559/-. The AO completed the assessment and made addition of this amount of ₹ 49,94,0159/- on account of additional income declared during the course of survey under section 133A of the Act conducted on 25.08-2009 by the investigation Wing of the Department. The AO initiated the penalty proceedings under section 271(1)(c) of the Act for concealment of particulars of income as well as for furnishing inaccurate particulars of income while completing assessment under section 143(3) of the Act vide order dated 30.12.2010. The relevant initiation reads as under:-

"Penalty proceedings under section 271(1)(c) are initiated for concealing the income and also for furnishing inaccurate particulars of income."

The AO also levied the penalty vide order dated 27.06.2011 under section 271(1)(c) of the Act on the charge of concealment of income and the relevant observation by para 6 reads as under:



6. *In view of the above facts and findings, I am satisfied that the assessee has concealed the particulars of his income and therefore penalty under section 271(1)(c) is clearly leviable on the assessee.*

4. At the outset, the learned Counsel for the assessee raised a legal issue under Rule 27 of the income Tax (Appellate Tribunal) Rules, 1963 that the penalty is initiated by the AO on both the charges i.e. for concealment of particulars of income and also furnishing of inaccurate particulars of income. According to her, the penalty initiated on both the charges is without jurisdiction as the AO was not sure about the charge for which levy is to be made. According to her, this is being a legal issue and it should be admitted and adjudicated upon.

5. On query from the Bench the learned Sr. Departmental Representative contested the reason that a new legal issue under Rule 27 of the income Tax (Appellate Tribunal) Rules, 1963, cannot be raised and further he supported the penalty order.

6. We have heard the rival contentions and gone through the facts and circumstances of the case. We find that the above statement of facts makes the position clear that the penalty is initiated by the AO for two charges i.e. for concealment of particulars of income as well as for furnishing of inaccurate particulars of income. We find that this issue is squarely covered in favour of assessee and against the Revenue by the decision of Hon'ble Bombay High Court in the case of CIT vs Samson Perinchery (2013) 392 ITR 4 (Bom), wherein it is held as under:-

“3 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 (1)(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 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.

4 The impugned order relied upon the following extract of Karnataka High Court's decision in CIT v/s. Manjunath Cotton and Ginning Factory 359 ITR 565 to delete the penalty:

“The Assessing Officer is empowered under the Act to initiate penalty proceedings once he is satisfied in the course of any proceedings that there is concealment of income or furnishing of inaccurate particulars of total income under clause (c). Concealment, furnishing inaccurate particulars of income are different. Thus, the Assessing Officer while issuing notice has to



come to the conclusion that whether is it a case of concealment of income or is it as case of furnishing of inaccurate particulars. The apex court in the case of Ashok Pai reported in [2007] 292 ITR 11 (SC) at page 19 has held that concealment of income and furnishing inaccurate particulars of income carry different connotations. The Gujarat High Court in the case of Manu Engineering reported in 122 ITR 306 and the Delhi High Court in the case of Virgo Marketing P. Ltd., reported in 171 Taxman 156, has held that levy of penalty has to be clear as to the limb for which it is levied and the position being unclear penalty is not sustainable. Therefore, when the Assessing Officer proposes to invoke the first limb being concealment, then the notice has to be appropriately marked. Similar is the case for furnishing inaccurate particulars of income. The standard proforma without striking of the relevant clauses will lead to an inference as to non-application of mind.”

5. The grievance of the Revenue before us is that there is no difference between furnishing of inaccurate particulars of income and concealment of income. Thus, distinction drawn by the impugned order is between Tweedledum and Tweedledee. In the above view, the deletion of the penalty, is unjustified.

6. The above submission on the part of the Revenue is in the face of the decision of the Supreme Court in



Ashok Pai v/s. CIT 292 ITR 11 [relied upon in Manjunath Cotton & Ginning Factory (supra)] – wherein it is observed that concealment of income and furnishing of inaccurate particulars of income in Section 271(1)(c) of the Act, carry different meanings/ connotations. Therefore, the satisfaction of the Assessing Officer with regard to only one of the two breaches mentioned under Section 271(1)(c) of the Act, for initiation of penalty proceedings will not warrant/ permit penalty being imposed for the other breach. This is more so, as an Assessee would respond to the ground on which the penalty has been initiated/notice issued. It must, therefore, follow that the order imposing penalty has to be made only on the ground of which the penalty proceedings has been initiated, and it cannot be on a fresh ground of which the Assessee has no notice.

7 Therefore, the issue herein stands concluded in favour of the Respondent Assessee by the decision of the Karnataka High Court in the case of *Manjunath Cotton and Ginning Factory (supra)*. Nothing has been shown to us in the present facts which would warrant our taking a view different from the Karnataka High Court in the case of *Manjunath Cotton and Ginning Factory (supra)*.

She also stated that Hon'ble Bombay High court has followed the decision of Hon'ble Karnataka High Court rendered in *Manjunath Cotton & Ginning Factory (Supra)*, wherein similar view is taken.

7. In the given facts and circumstance and discussion carried out above, we are of the view that the AO has initiated penalty proceedings for *furnishing of inaccurate particulars of income and also for*



concealment of particulars of income, and AO levying penalty for both the charges is evident from the penalty order. Upon perusal of the same, we find that AO has mixed up both the limbs whereas as per settled legal pronouncements of superior court, the two limbs of Section 271(1)(c) viz. furnishing of inaccurate particulars of income and concealment of income carry different meaning / connotations. Therefore, AO himself was not sure about the charge for which penalty was initiated and finally levied on the assessee. Hence, the issue, as rightly pointed out by AR stood covered in assessee's favor by Hon'ble Jurisdictional High Court in the case of Samson Perincherry (supra). Respectfully following the Hon'ble High Court decision, we confirm the order of CIT(A) deleting the penalty.

8. Coming to merits of the case, we find that the AO while levying penalty has levied on the charge that the assessee has concealed the particulars of income but he failed to specify how the concealment is proved. The AO has not done any exercise for that purpose. The AO simply relied on the surrender/disclosure made by the assessee during the course of survey conducted by the Investigation Wing of the department on 25.08.2009, much before the due date of filing of return of income and moreover the return of income was filed only on 30-09-2008. Including the income disclosed during the survey on account of unproved expenses of ₹ 42,51,500/- and unproved labour charges of ₹ 7,42,559/-. Simply disclosure made, during the course of survey and that also without any details found by the department, is not admissible in view of the decision of Hon'ble Kerala High Court in the case of Paul Mathews & Sons vs. CIT [2003] 263 ITR 101 (Kerala) and Hon'ble Madras High court in the case of CIT vs. S. Khader Khan Son [2008] 300 ITR 157 (Madras), wherein the unanimous view of the two High Courts that in the absence of any incriminating material the scope and ambit of the statement and disclosure made under section 133A of the Act has no evidentiary value. Similar are the facts in the present case the survey party of the



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investigation wing of the department does not found any evidence regarding the bogus nature of purchases and labour payments and no further enquiry was made or any verifications were carried out from the parties and further no material was confronted to the assessee. Hence, the disclosure seems to be voluntary and accordingly, we are of the view that the CIT(A) has rightly deleted the penalty on merits also. Accordingly, we confirm the order of CIT(A) and this issue of Revenue's appeal is dismissed.

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

Order pronounced in the open court on 15-06-2018.

आदेश की घोषणा खुले में दिनांक 15-06-2018 को की गई ।

Sd/-

(जी. मंजुनाथ /G MANJUNATHA)

(लेखा सदस्य / ACCOUNTANT MEMBER)

Sd/-

(महावीर सिंह /MAHAVIR SINGH)

(न्यायिक सदस्य/ JUDICIAL MEMBER)

Mumbai, Dated: 15-06-2018

Sudip Sarkar /Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT (A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.
//True Copy//

BY ORDER,

Assistant Registrar
ITAT, MUMBAI