

आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" 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.1328/PUN/2016

निर्धारण वर्ष / Assessment Year : 2007-08

Shri Bhupendra S. Shah,
Bhavik Developers, Bhavik Capital,
Besides 21st Century Hotel,
Opp. Kulkarni Garden,
Sharanpur Road, Nashik – 422002

PAN : ADBPS3062J

.....अपीलार्थी / Appellant

बनाम / V/s.

The Income Tax Officer,
Central – 1, Nashik

.....प्रत्यर्थी / Respondent

Assessee by : Shri V.L. Jain
Revenue by : Mrs. Shweta Mishra

सुनवाई की तारीख / Date of Hearing : 02-08-2018

घोषणा की तारीख / Date of Pronouncement : 08-08-2018

आदेश / ORDER

PER VIKAS AWASTHY, JM :

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-12, Pune dated 29-03-2016 for the assessment year 2007-08 in confirming/enhancing penalty levied u/s. 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as "the Act").

2. The brief facts of the case as emanating from records are : The assessee is a land developer. A search and seizure action u/s. 132(1) of the Act was carried out on Jadhav-Shah Group on 08-02-2008. The residential and business premises of the assessee were covered under the search and seizure action. In response to the notice u/s. 153A of the Act, the assessee filed return of income on 29-09-2008 declaring total income of Rs.34,99,270/-. The assessee in the return of income disclosed additional income of Rs.12,00,000/-. The Assessing Officer during the assessment proceedings made various additions/disallowances in the income returned by the assessee. The Assessing Officer recorded satisfaction for initiating penalty proceedings u/s. 271(1)(c) in respect of additional income of Rs.12,00,000/- declared by the assessee, unexplained investment u/s. 69 of the Act Rs.16,00,000/- and unrecorded interest income Rs.1,12,000/-. However, at the time of passing order u/s. 271(1)(c), the Assessing Officer levied penalty only in respect of undisclosed interest income Rs.1,12,000/- . The assessee carried the matter in appeal before the Commissioner of Income Tax (Appeals) against levy of penalty. The Commissioner of Income Tax (Appeals) not only confirmed penalty u/s. 271(1)(c) on addition of Rs.1,12,000/- but also enhanced penalty by levying penalty in respect of undisclosed income declared by the assessee i.e. Rs.12,00,000/-. Now, the assessee is in second appeal before the Tribunal assailing the findings of Commissioner of Income Tax (Appeals) in confirming penalty on addition of Rs.1,12,000/-, as well as the levy of penalty by the Commissioner of Income Tax (Appeals) on addition of undisclosed income Rs.12,00,000/-.

3. Shri V.L. Jain appearing on behalf of the assessee submitted that apart from challenging the penalty on merits, the assessee is also assailing

the manner of recording satisfaction for initiating penalty proceedings u/s. 271(1)(c) of the Act. The ld. AR pointed that the Assessing Officer while initiating penalty proceedings in respect of additional income of Rs.12,00,000/- merely mentioned that penalty proceedings u/s. 274 r.w.s. 271(1)(c) are separately initiated. The Assessing Officer has not mentioned the charge u/s. 271(1)(c) for which penalty proceedings are being initiated on additional income declared by the assessee. The ld. AR further submitted that in respect of undisclosed interest income of Rs.1,12,000/-, the Assessing Officer initiated penalty proceedings for concealment of income. While passing order levying penalty u/s. 271(1)(c), the Assessing Officer has not levied penalty on additional income Rs.12,00,000/- declared by the assessee in the return of income. Whereas, in respect of addition of Rs.1,12,000/- penalty u/s. 271(1)(c) has been levied for furnishing inaccurate particulars of income and concealing the particulars of income. The Assessing Officer has invoked both the limbs of section 271(1)(c). The manner in which satisfaction has been recorded and penalty has been levied is inconsistent and contrary to the legal requirements and the decision of Hon'ble Bombay High Court in the case of Commissioner of Income Tax Vs. Samson Perinchery reported as 392 ITR 4.

4. On the other hand Mrs. Shweta Mishra representing the Department vehemently defended the impugned order and prayed for sustaining the penalty proceedings.

5. We have heard the submissions made by representatives of rival sides and have perused the orders of authorities below. In the present case the assessee has assailed levy of penalty on merits as well as on legal

ground i.e. defect in recording of satisfaction. A perusal of assessment order shows that while recording of satisfaction for levy of penalty in respect of additional income Rs.12,00,000/-, the Assessing Officer has observed as under :

“5.2 The assessee has filed the original return of income with ACIT Circle-2, Nashik on 31.10.2007 declaring income of Rs.21,11,867/-. During the year under consideration, while filing the return of income u/s. 153A, the assessee has disclosed additional income of Rs.12,00,000/- and accordingly the income declared as per return of income in response to notice u/s. 153A is Rs.34,99,270/-. Since, the additional income of Rs.12,00,000/- is detected and disclosed by the assessee as result of search action, the penalty proceedings u/s. 274 r.w.s. 271(1)(c) are separately initiated.”

6. A perusal of satisfaction recorded by the Assessing Officer reveal that there is no mention of any charge for which penalty is being levied under the provisions of section 271(1)(c) of the Act. It is not decipherable from the satisfaction recorded by the Assessing Officer as to under which limb of section 271(1)(c) penalty proceedings are initiated in respect of addition of Rs.12,00,000/-. The recording of satisfaction without mentioning of specific charge is against the principles of natural justice. The assessee should know the specific charge against which he has to defend in penalty proceedings. Thus, manner in which satisfaction has been recorded for levy of penalty u/s. 271(1)(c) in respect of addition of Rs.12,00,000/- falls short of legal requirements and hence is not sustainable in the eye of law.

7. It is further observed that the Assessing Officer has not levied penalty u/s. 271(1)(c) in respect of additional income declared Rs.12,00,000/- after recording of satisfaction. The Commissioner of Income Tax (Appeals) in First Appellate proceedings levied penalty on the above said additional income by exercising power of enhancement. It is a

well settled law that the authority who has recorded satisfaction alone can levy penalty. In our considered view, the Commissioner of Income Tax (Appeals) in the present case has exceeded his jurisdiction and has levied penalty on the addition for which the satisfaction was recorded by the Assessing Officer. The penalty on Rs.12,00,000/- is liable to be deleted on the ground of lack of jurisdiction as well.

8. In respect of addition of interest income Rs.1,12,000/- the Assessing Officer has recorded satisfaction for initiating penalty proceedings for concealment of income. The relevant extract of the satisfaction recorded by the Assessing Officer reads as under :

“Since, the assessee has concealed the income of Rs.1,12,000/-, the penalty proceedings u/s. 274 r.w.s. 271(1)(c) with Explanation-1 are separately initiated.”

9. A perusal of order dated 28-03-2013 levying penalty u/s. 271(1)(c) shows that the Assessing Officer levied penalty on the addition of Rs.1,12,000/- by invoking both the charges of section 271(1)(c) i.e. furnishing inaccurate particulars of income and concealing the particulars of income. The relevant extract of the penalty order levying penalty in respect of addition of Rs.1,12,000/- reads as under :

“7. After going through the reply of the assessee, facts on record and in view of the above discussion, I am of the opinion that the assessee has furnished inaccurate particulars of income and has concealed the particulars of his income knowingly in the meaning of section 271(1)(c) of the I.T. Act 1961. Therefore, it is a fit case.”

10. A conjoint reading of satisfaction recorded and the order levying penalty shows that there was ambiguity in the mind of Assessing Officer while levying penalty. The satisfaction has been recorded for concealment

and penalty has been levied for both the charges i.e. inaccurate particulars of income and concealment of income. The Hon'ble Bombay High Court in the case of Commissioner of Income Tax Vs. Samson Perinchery (supra) has held that where satisfaction has been recorded for one breach u/s. 271(1)(c) and the penalty has been levied for another, such order levying penalty u/s. 271(1)(c) is not permissible. The relevant extract of the order of Hon'ble High Court reads as under :

“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.”

11. Thus, in view of the facts of the case and the case laws discussed above, the order levying penalty is liable to be set aside. Accordingly, the impugned order is set aside and the appeal of the assessee is allowed.

12. In the result, the appeal of the assessee is allowed.

Order pronounced on Wednesday, the 06th day of August, 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 : 06th August, 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)-12, Pune
4. The Pr. CIT (Central), Nagpur
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच,
पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

//सत्यापित प्रति // True Copy//

आदेशानुसार / BY ORDER,

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