

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

**BEFORE SHRI G.D. AGRAWAL, PRESIDENT
&
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER**

**ITA Nos.5891 to 5895/Del/2016
Assessment Years: 2009-10 to 2013-14**

M/s OSE Infrastructure Ltd., 3 rd Floor, Tower D, Global Business Park, MG Road, Gurgaon. PAN: AAACO4687Q (Appellant)	vs	ACIT, Central Circle -26, New Delhi. (Respondent)
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Revenue by	Sh. S.R. Senapati, Sr.DR
Assessee by	Shri K.V.S.R. Krishna, CA

Date of Hearing	31.07.2018
Date of Pronouncement	14.08.2018

ORDER

PER BENCH:

Challenging the common order of the learned Commissioner of Income-tax (Appeals)-31, New Delhi (for short "Ld. CIT(A)) dated 24.08.2016, assessee preferred these appeals.

2. Parties, facts and question of law involved in all these matters are substantially the same, as such, we deem it just and fair to dispose of the same by way of common order with reference to the facts relating to the year 2009-10.

3. Brief facts of the case are that originally the assessee filed the return of income on 30.9.2009 declaring a loss of Rs.1,13,74,180/-. Pursuant to the search and seizure operations u/s 132 of the Income-tax Act, 1961 ("the Act") on 10.2.2012 and issuance of notice u/s 153A of the Act, assessee filed the return of income declaring a loss of Rs.27,62,303/- which the assessee revised declaring nil income. Assessment was completed on the nil income only. However, the learned Assessing Officer (Ld. AO) opined that the conduct of the assessee in initially declaring a huge loss, which was reduced substantially pursuant to the notice u/s 153A and subsequent revision declaring nil income amounts to concealment of income by filing inaccurate particulars. He initiated proceedings u/s 271(1)(c) and concluded them by order dated 29.9.2015 with the levy of penalty of Rs.35,14,622/-, being the 100% of the tax sought to be evaded.

4. Appeal preferred by the assessee was dismissed by the learned CIT(A) by way of impugned order. Hence, the assessee filed this appeal stating that no material was found in the course of search and seizure operations basing on which any addition could have been made and the learned CIT(A) failed to appreciate that in search cases explanation 5A to Section 271(1)(c) is applicable.

5. Argument of the learned AR is three fold. Firstly, the notice does not spell out under which limb of Section 271(1)(c), whether it is for concealment of income or for furnishing of inaccurate particulars, the penalty was proposed. For this proposition he placed reliance on CIT vs SSA's Emerald Meadows (SC) in CC

No.11485/2016 dated 5.8.2016 and CIT vs. Manjunatha Cotton Ginning Factory (2013) 359 ITR 565 (kar)(HC). Secondly, he submits that when the assessee filed the return pursuant to notice u/s 153A of the Act and validly revised it, such return takes the place and deemed to have been filed the return u/s 139(1) of the Act and since the assessment is complete accepting the revised return, no penalty could be levied. For this proposition, he placed reliance on CIT vs Neeraj Jindal (2017) 393 ITR 1 (Del)(HC); ACIT vs Splendor Landbase Ltd., ITA No.2461/Del/2016 (ITAT Del); and Prem Arora vs DCIT (2017) 78 DTR 91. Lastly, it is contended by the learned AR that during the search no incriminating documents, assets or income was found which resulted in the addition, as such, under Explanation 5A of Section 271(1)(c) of the Act, no penalty is leviable.

6. Learned DR heavily relied upon the orders of the authorities below and submitted that the case law relied upon by the assessee has no application to the facts of the case.

7. We have gone through the record in the light of the submissions made on either side. As a matter of fact, there is no dispute that pursuant to the notice issued u/s 153A, the assessee filed the return of income on 14.7.2014 which was revised on 24.2.2015 declaring nil income and the assessment was also completed on 24.3.2015 at nil income only. On the question of whether or not the assessee set up any business during the year and the loss claimed cannot be allowed, in the revised return the assessee withdrew such a claim and declared the income at nil. No doubt the question of whether or not the assessee set up any business during the year and whether no business could be turned out even after the business was set up is a disputed question of fact, and is a debatable issue.

8. However, learned AO felt that the claim of loss on the premise that the business was set up amounts to concealment of income by filing inaccurate particulars. From the assessment order it is not clear as to whether it was concealment of income or furnishing of inaccurate particulars.

9. So also the notice issued u/s 174 read with Section 271 of the Act, which reads as follows:

“Sub:- Penalty Proceedings u/s 271(l)(c) of the Income Tax Act, 1961 for the assessment year -Reg.

With reference to the above you are given an opportunity to show cause as to why penalty under section 271(l)(c) of the Income Tax Act. 1961 for the A.Y-2009-10 should not be imposed.

2. You are hereby requested to appear before me in Room no. 323, 3rd Floor, ARA Centre, Jhandewalan Extn., New Delhi on 17.04.2015 at 11.00 and show cause why an order imposing a penalty on you should not be made under section 271 of the Income Tax Act, 1961. If you do not wish to avail yourself of this opportunity of being heard in person or through authorized representative you may show cause in writing on or before the said date which will be considered before any such order is made under section 271.”

10. There is no mention of the limb, which is attracted in this matter so as to enable the assessee to defend themselves. On this aspect, in the case of *CIT vs Manjunatha Cotton & Ginning Factory, 359 ITR 565 (Kar)* vide paragraph 60, the Hon’ble Karnataka High Court has held as follows :-

“60. Clause (c) deals with two specific offences, that is to say, concealing particulars of income or furnishing inaccurate particulars of income. No doubt, the facts of some cases may attract both the offences and in some cases there may be overlapping of the two offences but in such cases the initiation of the penalty proceedings also must be for both the offences. But drawing up penalty proceedings for one offence and finding the assessee guilty of another offence or finding him guilty for either the one or the other cannot be sustained in law. It is needless to point out satisfaction of the existence of the grounds mentioned in Section 271(1)(c) when it is a sine qua non for initiation or proceedings, the penalty proceedings should be confined only to those grounds and the said grounds have to be specifically stated so that the assessee would have the opportunity to meet those grounds. After, he places his version and tries to substantiate his claim, if at all, penalty is to be imposed, it should be imposed only on the grounds on which he is called upon to answer. It is not open to the authority, at the time

of imposing penalty to impose penalty on the grounds other than what assessee was called upon to meet. Otherwise though the initiation of penalty proceedings may be valid and legal, the final order imposing penalty would offend principles of natural justice and cannot be sustained. Thus once the proceedings are initiated on one ground, the penalty should also be imposed on the same ground. Where the basis of the initiation of penalty proceedings is not identical with the ground on which the penalty was imposed, the imposition of penalty is not valid. The validity of the order of penalty must be determined with reference to the information, facts and materials in the hands of the authority imposing the penalty at the time the order was passed and further discovery of facts subsequent to the imposition of penalty cannot validate the order of penalty which, when passed, was not sustainable.”

11. Hon'ble Karnataka High Court in the case of CIT vs SSA's Emerald Meadows supra in ITA No. 380 of 2015 dated 23.11.2015, which was approved by the Hon'ble Supreme Court by dismissal of Special Leave Petition (SLP) filed by the Revenue in CC No. 11485/2016 dated 5.8.2016, considered the question of law as to,-

“Whether, omission if assessing officer to explicitly mention that penalty proceedings are being initiated for furnishing of inaccurate particulars or that for concealment of income makes the penalty order liable for cancellation even when it has been proved beyond reasonable doubt that the assessee had concealed income in the facts and circumstances of the case?”

12. And the Hon'be High Court answered the same in favour of the assessee observing that:

“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 COMMISSIONER OF INCOME TAX - VS- MANJUNATHA COTTON AND GINNING FACTORY (2013) 359 ITR 565. 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.”

13. The Special Leave Petition filed by the Revenue challenging the aforesaid judgement of the High Court was dismissed by the Hon'ble Supreme Court holding :

"We do not find any merit in this petition. The special leave petition is, accordingly, dismissed."

14. It is, therefore, clear that for the AO to assume jurisdiction u/s 271(1)(c), proper notice is necessary and because of the defect in notice u/s 274 of the Act, we find it difficult to hold that the learned AO rightly assumed jurisdiction to passed the order levying the penalty.

15. Be that as it may, as the facts indicate the entire dispute relates to the question whether the business is set up or not. Whether the assessee did any business or not is not relevant if the business is set up during the year under consideration. This is a debatable issue and was not finally decided by the AO because the assessee withdrew their claim by revising the return of income. As is held in the case of Neeraj Jindal (supra) and other cases relied upon by the assessee, the return of income filed pursuant to the notice u/s 153A takes the place of the return filed u/s 139(1) which was validly revised by the assessee even before any defect was pointed out by the learned AO. In such circumstances, in view of the decision in the case of CIT vs Reliance Petro Products P. Ltd. (2010) 322 ITR 158 (SC), no penalty could be levied.

16. Lastly, when the revised return is accepted and the income is assessed as per the revised income, there is no scope for penalty. In the case of Kirit Dahyabhai Patel vs ACIT, (2017) 80 Taxmann.com 162 (Guj), the Hon'ble High Court held that in view of specific provision of Section 153A, the return of income

filed in response to notice u/s 153A is to be considered as return filed u/s 139, as the AO has made assessment on the said return and, therefore, the return has to be considered for the purpose of penalty u/s 271(1)(c) of the Act and the penalty is to be levied on the income assessed over and above the income returned u/s 153A, if any. Admittedly, in this matter both the returned income and the assessed income are nil. On this ground also, we cannot sustain the penalty order.

17. Viewing from any angle, we do not find any ground to sustain the penalty, as such, we find that the penalty proceedings have to be quashed. We do so accordingly.

18. Following the same, we answer the grounds in the other Appeal Nos. 5892 to 5895/Del/2016 accordingly.

19. In the result, all the appeals of the assessee are allowed and the penalty for the Assessment Years 2009-10 to 2013-14 is hereby deleted.

Order pronounced in the open court on 14th August, 2018

Sd/-

**(G.D. AGRAWAL)
PRESIDENT**

Dated: 14th August, 2018

VJ

sd/-

**(K. NARASIMHA CHARY)
JUDICIAL MEMBER**

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI

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