

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR
श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 230/JP/2018
निर्धारण वर्ष / Assessment Year :2012-13

Shankar Singh Sherawat, Village- Sukhiya, Ward No. 2, Near Adarsh Public School, Tehsil- Sanganer, Jaipur.	बनाम Vs.	Income Tax Officer Ward-7(2), Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: BUEPS 3763 H		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri P.C. Parwal (CA)
राजस्व की ओर से / Revenue by : Shri Anup Singh (JCIT)

सुनवाई की तारीख / Date of Hearing : 13/08/2018
उदघोषणा की तारीख / Date of Pronouncement : 14/08/2018

आदेश / ORDER

PER: VIJAY PAL RAO, J.M.

This appeal by the assessee is directed against the order dated 13/12/2017 of Id. CIT(A)-3, Jaipur arising from the penalty order passed U/s 271(1)(c) of the Income Tax Act, 1961 (in short the Act) for the A.Y. 2012-13. The assessee has raised following grounds of appeal:

- “1. Under the facts and circumstances of the case, the order passed U/s 271(1)(c) is illegal and bad in law.*
- 2. The Id. CIT(A) has erred on facts and in law in confirming the levy of penalty of Rs. 1,09,880/- U/s 271(1)(c) of the IT Act, 1961 with the direction to recalculate the penalty by reducing income by Rs. 20,000/-..*

3. *The assessee craves to amend, alter and modify any of the grounds of appeal.*
4. *The appropriate cost be awarded to the assessee."*

2. We have heard the Id. AR as well as the Id DR and considered the relevant material on record. The assessee alongwith his brother Shri Kailash Chand Jat sold the land in question after some development work and carving out of plots. The Assessing Officer was of the view that the assessee has converted its capital asset into stock in trade during the year under consideration and then sold the same in plots. Thus, the Assessing Officer has bifurcated the long term capital gain declared by the assessee into two parts i.e. long term capital gain and business income and consequently made addition. The penalty U/s 271(1)(c) of the Act was levied by the Assessing Officer against the additions made on account of gain arising from the land in question and further disallowance of deduction U/s 80C of the Act of Rs. 20,000/-. At the outset, we note that an identical issue was considered by us in the case of Kailash Chand Jat Vs ITO in ITA No. 229/JP/2018 vide order dated 09/8/2018 in para 6 to 7.1 as under:

"6. We have heard the rival submissions as well as the relevant material available on the record. The assessee has raised the legal ground of validity of initiation of proceedings and consequential order passed by the Assessing Officer U/s 271(1)(c) of the Act. We note that in the assessment order, the Assessing Officer, though,

recorded its satisfaction for initiating the penalty proceedings, however, except the term "this issue is fit for initiating the penalty proceedings", the Assessing Officer has not mentioned whether it is a case of concealment of particulars of income or furnishing inaccurate particulars of income. Similarly, in the notice dated 23/03/2015 issued U/s 274 of the Act for initiation of penalty proceedings dated 23/3/2015 placed at page 8 of the paper book is also without specifying the charge and default on the part of the assessee. The relevant para of the charge mentioned in the show cause notice is as under:

"Have concealed the particulars of your income or furnished inaccurate particulars of such income."

Thus, the Assessing Officer has neither strike of the irrelevant part nor specified the ground and charge against which the penalty proceedings were initiated against the assessee. Thus, it is clear case of non-specifying the grounds and charge for which the penalty proceedings were initiated by the Assessing Officer. The Hon'ble Karnataka High Court in the case of CIT Vs. Manjunatha Cotton & Ginning Factory & ors. (supra), in para 60 to 63 has held as under:

“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(l)(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.

61. 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 a case of furnishing of inaccurate particulars. The Apex Court in the case of *T. Ashok Pai v. CIT* [2007] 292 ITR 11/161 Taxman 340 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 *CIT v. Manu Engg.* [1980] 122 ITR 306 and the Delhi High Court in the case of *CIT v. Virgo Marketing (P.) Ltd.* [2008] 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.

INDEPENDENT PROCEEDING

62. The penalty proceedings are distinct from assessment proceedings, and independent therefrom. The assessment proceedings are taxing proceedings. The proceedings for imposition of penalty though emanating from proceedings of assessment are independent and separate aspects of the proceeding. Separate provision is made for the imposition of penalty and separate notices of demand are made for recovery of tax and amount of penalty. Also separate appeal is provided against order of imposition of penalty. Above all, normally, assessment proceedings must

precede penalty proceedings. Assessee is entitled to submit fresh evidence in the course of penalty proceedings. It is because penalty proceedings are independent proceedings. The assessee cannot question the assessment jurisdiction in penalty proceedings. Jurisdiction under penalty proceedings can only be limited to the issue of penalty, so that validity of the assessment or reassessment in pursuance of which penalty is levied, cannot be the subject matter in penalty proceedings. It is not possible to give a finding that the reassessment is invalid in such penalty proceedings. Clearly, there is no identity between the assessment proceedings and the penalty proceedings. The latter are separate proceedings that may, in some cases, follow as a consequence of the assessment proceedings. Though it is usual for the Assessing Officer to record in the assessment order that penalty proceedings are being initiated, this is more a matter of convenience than of legal requirement. All that the law requires, so far as the penalty proceedings are concerned, is that they should be initiated in the course of the proceedings for assessment. It is sufficient, if there is some record somewhere, even apart from the assessment order itself, that the Assessing Officer has recorded his satisfaction that the assessee is guilty of concealment or other default for which penalty action is called for. Indeed, in certain cases, it is possible for the Assessing Officer to issue a penalty notice or initiate penalty proceedings even long before the assessment is completed. There is no statutory requirement that the penalty order should precede or be simultaneous with the assessment order. In point of fact, having regard to the mode of computation of penalty outlined in the statute, the actual penalty order cannot be passed until the assessment is finalised.

CONCLUSION

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

- (a) Penalty under Section 271(l)(c) is a civil liability.
- (b) Mens rea is not an essential element for imposing penalty for breach of civil obligations or liabilities.
- (c) Wilful concealment is not an essential ingredient for attracting civil liability.
- (d) Existence of conditions stipulated in Section 271(1)(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) Even if there is no specific finding regarding the existence of the

conditions mentioned in Section 271(l)(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(l)(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(l)(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 insofar 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.

There is no dispute that the said decision of Hon'ble Karnataka High Court was followed in a subsequent decision in the case of CIT Vs SSA'S Emerald Meadows (supra) and the SLP filed by the revenue against the said decision was dismissed by the Hon'ble Supreme Court reported in 242 taxman 180. Further the Hon'ble Jurisdictional High Court in the case of Sheveta Construction Co. Pvt. Ltd. in DBIT Appeal No. 534/2008 dated 06.12.2016 in para 9 has held as under:

"Taking into consideration the decision of the Andhra Pradesh High Court which virtually considered the subsequent law and the law which was prevailing on the date the decision was rendered on 27.08.2012. In view of the observation made in the said judgment, we are of the opinion that the contention raised by the appellant is required to be accepted and in the finding of Assessing Officer in the assessment order it is held that the AO, has to give a notice as to whether he proposes to levy penalty for concealment of income or furnishing inaccurate particulars. He cannot have both the conditions and if it is so he has to say so in the notice and record a finding in the penalty order" (Emphasis Supplied)

In view of the above, penalty levied by the Ld. AO deserves to be deleted as the same has been levied by him in a mechanical manner and without application of mind.'

Accordingly as held by the Hon'ble High Court, specification of the existence of the ground mentioned in Section 271(1)(c) of the Act is mandatory for initiation of proceedings and the penalty proceedings should be confined only to those grounds. Therefore, the grounds has to be specifically stated in the show cause notice so that the assessee would have the opportunity to meet those grounds. The Assessing Officer while ensuing the notice has to come to the conclusion whether it is a case of concealment of income or it is a case of furnishing of inaccurate particulars of income. The 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. The ambiguity in specifying the limb for initiating the proceedings for levy of penalty renders the initiation invalid and consequential order passed U/s 271(1)(c) of the Act also invalid. Hence, in view of the fact that the Assessing Officer has not specified the limb and charge for initiation of penalty proceedings in the show cause notice then the impugned order passed by the Assessing Officer is not sustainable and liable to be quashed.

6.1 *It is pertinent to note that in the show cause notice, the Assessing Officer has mentioned the charge as the assessee furnished*

inaccurate particulars of income or concealed the particulars of income whereas in the order passed U/s 271(1)(c), the Assessing Officer has stated that the assessee has furnished inaccurate particulars of income and concealed his income, therefore, the charge in the show cause notice is not certain whereas the levy of penalty in the impugned order is for both the limbs which is inconsistent with the charge as mentioned in the show cause notice. The findings of the Assessing Officer in the order passed U/s 271(1)(c) holding the assessee guilty of charge of furnishing inaccurate particulars of income and concealment of income is also contrary to the facts of the case. The penalty in this case was levied against the addition made on account of bifurcation of capital gain into two parts one as Long Term Capital Gain and other as business income. This action of the Assessing Officer bifurcating is based on the premises that the development work on the land and carving out of plots amount to converting the capital asset into stock in trade. Therefore, it is not a case of suppression of particulars or details of income but it is only different of view on the matter before the Assessing Officer. Hence it is not a case of concealment of particulars of income but at the most can be a case of furnishing inaccurate particulars of income. As regards the fair market value as on 01/4/1981, it is matter of estimation and cannot be regarded by suppression of particulars of income and consequently charge of concealment of particulars of income. The claim of deduction U/s 80C of the Act regarding the tuition fee and LIC premium is also not a bogus claim and disallowance of same for want of payment receipt can only be considered as furnishing the inaccurate particulars of income but not as concealment of income when the fact regarding the children of assessee studying and the assessee is having LIC policy

is not found to be false. Hence, the findings of the A.O. holding the assessee guilty of concealment of particulars of income is contrary to the facts of the case. Accordingly, when the Assessing Officer is not allowed to levy the penalty, which is contrary to the charge mentioned in the show cause notice then the impugned order passed by the Assessing Officer is not sustainable and liable to be quashed.

- 7. On the merits of the penalty, we have heard the Id AR as well as the Id DR and considered the relevant material on record. The Assessing Officer made addition in respect of gain arising from sale of ancestral land held by the assessee by estimating the cost of acquisition as on 01/4/1981 which is different from the estimation of cost of acquisition by the assessee. The second addition was made by treating the development work and carving out the plot of the land as conversion of the capital asset into stock in trade. It is not the case of the Assessing Officer that the assessee is in the business of real estate but clearly stated in the assessment order that the assessee is doing agricultural activities. Therefore, even if the assessee has carried out some development work and carving out the plots prior to the sale, the same would not amount to a trading or business activity when the land in question was otherwise accepted by the Assessing Officer up till this year as capital asset. Further the assessee was holding this land as a successor and the cost of acquisition was determined by estimation of fair market value as on 01/4/1981, therefore, the addition made by the Assessing Officer on both the counts would not amount to concealment of income or furnishing of inaccurate particulars of income. Even otherwise it is a bonafide claim of assessee to offer the entire gain as long term capital gain arising*

from sale of the land in question which is the only transaction of sale and no transaction of purchase. So far as the penalty levied on account of addition made by the Assessing Officer in respect of sale of land in question, the same is otherwise not sustainable on the merits of the case.

7.1 *As regards the penalty levied for disallowance of claim U/s 80C of the Act of Rs. 16,000/-, the Assessing Officer has disallowed the same for want of production of evidence. Though, it was not a case of the Assessing Officer that the assessee has made bogus claim but during the assessment proceedings, the assessee being the agriculturists could not produce the evidence on account of payment of tuition fee of Rs. 6,000/- and Life Insurance Premium of Rs. 10,000/-. Accordingly, only because the assessee could not produce the receipt of premium as well as the tuition fee would not lead to the conclusion that the assessee has not paid LIC premium or tuition fee for the children. Accordingly, even if the said disallowance is made for want of requisite receipt, the claim of the assessee cannot be considered as bogus claim. Hence, the penalty levied by the Assessing Officer without giving a concluding finding that it was a false claim, the disallowance made by the Assessing Officer for want of relevant evidence would not lead to the conclusion that the assessee has furnished inaccurate particulars of income or concealed the particulars of income. Hence, the penalty levied by the Assessing Officer is liable to be canceled. We order accordingly."*

3. Since the facts and circumstances as well as the issue involved in the case in had is identical to the case of assessee's brother Shri Kailash

Chand Jat Vs. ITO (supra), accordingly, following the earlier order of this Tribunal, we delete the penalty levied U/s 271(1)(c) of the Act.

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

Order pronounced in the open court on 14/08/2018.

Sd/-
(विक्रम सिंह यादव)
(VIKRAM SINGH YADAV)
लेखा सदस्य / Accountant Member

Sd/-
(विजय पाल राव)
(VIJAY PAL RAO)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 14th August, 2018

*Ranjan

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Shri Shankar Singh Sherawat, Jaipur.
2. प्रत्यर्थी / The Respondent- The ITO, Ward-7(2), Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 230/JP/2018)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar