

आयकर अपीलीय अधिकरण, कटक न्यायपीठ, कटक
IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK
BEFORE SHRI N.S.SAINI, AM & SHRI PAVAN KUMAR GADALE, JM

आयकर अपील सं./ITA No.363/CTK/2016

(निर्धारण वर्ष / Assessment Year :2011-2012)

Smt. Mira Devi Dasrapuria, Main Road, Khurda-752055	Vs.	ITO, Khurda
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ABKPM 8607 J		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारिती की ओर से /Assessee by : Shri Mahesh Kumar Agarwalla,AR

राजस्व की ओर से /Revenue by : Shri D.K.Pradhan,CITDR

सुनवाई की तारीख / Date of Hearing : **24/08/2017**

घोषणा की तारीख/Date of Pronouncement **31/08/2017**

आदेश / O R D E R

Per Shri Pavan Kumar Gadale, JM:

The assessee has filed an appeal against the order of CIT(A)-1, Bhubaneswar, dated 15.7.2016, passed in I.T.Appeal No.0317/15-16, u/s.271(1)(c) of the Income Tax Act, 1961 for the assessment year 2011-2012.

2. The assessee has challenged the action of CIT(A) in confirming the penalty levied u/s.271(1)(c) of the Act, though the assessee has furnished information and accepted the income in the course of assessment proceedings.

3. Brief facts of the case are that the assessee is in the business of retail trading in cement & iron materials & wholesale distributor of Airtel RCV and filed the return of income electronically for the assessment year 2010-2011 on 29.09.2011 with total income of Rs.1,81,000/- and the return of income was processed u/s.143(1) of the Act. Subsequently

notice u/s.143(2) and 142(1) of the Act were issued to the assessee along with questionnaire. In compliance, the Id. AR of the assessee appeared from time to time and furnished the information. The AO on perusal of ledger accounts found that the assessee has received commission from Airtel distributorship and such commission was not disclosed in the profit and loss account and the assessee was issued show cause notice u/s.142(1) to disclose the retail commission receipt from company and percentage commission. Assessee filed explanations referred at para 4.3 of the order where it was explained that the assessee firm received commission from the companies titled as RS & FLY Commission, whereas RS commission is appropriated by the firm and flying commission is distributed to retailers working under the firm and this commission was issued by way of credit notes and out of the total commission amount paid to the retailers is debited and during the financial year 2009-2010 assessee has received total commission of Rs.29,76,728/- and fly commission of Rs.14,00,813/- which was included in the purchases and after considering debit and credit notes, remaining commission was offered to tax. The AO found that the assessee has maintained a purchase register and on comparing of the company's ledger there is a difference of Rs.7,01,267/-. Further the AO dealt on the accounting system of commission paid and received and finally concluded that Rs.7,01,267/- is in the nature of unexplained expenditure and assessed the total income of Rs.8,82,260/- and passed the order u/s.143(3) of the Act dated 26.3.2014. Subsequently the AO issued

penalty notice u/s.274(1) r.w.s.275(1)(c) of the Act and the assessee has filed written submissions and prayed for dropping the penalty proceedings. The AO considered the findings of assessment and the submissions made in the course of assessment proceedings and explanations filed on 13.8.2014 and 1.9.2014 in the proceedings. But Id.AO is of the opinion that the assessee has furnished inaccurate particulars and levied penalty of Rs.1,19,150/- and passed order u/s.271(1)(c) of the Act, dated 15.9.2014.

4. Aggrieved by the order of AO, the assessee filed an appeal before the CIT(A). Id. CIT(A) considered the findings of AO and also submissions made by the Id. AR and found that the AO action is tenable and confirmed the levy of penalty.

5. Aggrieved by the order of CIT(A), the assessee has filed an appeal before the Tribunal. Before us, Id. AR for the assessee submitted that the Id. CIT(A) has erred in confirming the penalty irrespective of the fact that the assessee has accepted the addition and has not contested the quantum appeal and also there is no wilful or wanton act on the part of the assessee to conceal the income or furnish inaccurate particulars further the assessee being a Senior Citizen assessed to the addition and no contested the quantum appeal before the appellate authority and prayed for deletion of penalty. Contra, Id. DR relied on the order of CIT(A).

6. We have heard the rival submissions and perused the material on record. Prima facie, Id. AR's contention that the CIT(A) has confirmed the penalty u/s.271(1)(c) of the Act narrating the facts of claim in the

assessment proceedings with respect of credit notes and differential payment of commission and receipt of the commission hence, the AO made an addition of Rs.7,01,267/- whereas the Id. AR submitted that the assessee being a senior citizen has accepted the addition and paid the taxes and the levy of penalty for such act is not tenable.

7. We on perusal of the penalty order found that the assessee has furnished the explanations and reasons and circumstances for accepting the addition and further to buy peace with the department and to avoid the litigations. We are of the view any addition by the AO in the assessment proceedings cannot be a gateway for levy of penalty and also levy of penalty is not automatic. Further, Hon'ble Supreme Court in the case of Reliance Petroproducts (P) Ltd., (2010) 322 ITR 158 (SC), wherein it was observed that "in order to expose the assessee to the penalty unless the case is strictly covered by the provision, the penalty provisions cannot be invoked. We support our view with the decision of Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory, (2013) 359 ITR 565, wherein it is held as under :-

Held :

Penalty u/s 271(1)(c) is a civil liability. Mens rea is not an essential element for imposing penalty for breach of civil obligations or liabilities. Willful concealment is not an essential ingredient for attracting civil liability. Existence of conditions stipulated in Section 271(1)(c) is a sine qua non for initiation of penalty proceedings u/s 271. The existence of such conditions should be discernible from the Assessment Order or order of the Appellate Authority or Revisional Authority.

Even if there is no specific finding regarding the existence of the conditions mentioned in Section 271(1)(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. Even if these conditions do not exist in the assessment order passed, at least, a direction to initiate

proceedings u/s 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). The said deeming provisions are not applicable to the orders passed by the Commissioner of Appeals and the Commissioner.

The imposition of penalty is not automatic. Imposition of penalty even if the tax liability is admitted is not automatic. 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 AO in the assessment order.

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. 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.

The direction referred to in Explanation IB to Section 271 of the Act should be clear and without any ambiguity. If the AO 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.

Notice u/s 274 of the Act should specifically state the grounds mentioned in Section 271(1)(c), i.e., whether it is for concealment of income or for furnishing of incorrect particulars of income. Sending printed form where all the ground mentioned in Section 271 are mentioned would not satisfy requirement of law.

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. Taking up of penalty proceedings on one limb and finding the assessee guilty of another limb is bad in law. 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.

The findings recorded in the assessment proceedings in so far 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.

(Para 63)

In the light of what we have stated above, it is clear that merely because the assessee agreed for addition and accordingly assessment order was passed on the basis of this addition and when the assessee has paid the tax and the interest thereon in the absence of any material on record to show the concealment of income, it cannot be inferred that the said addition is on account of concealment. Moreover, the assessee has offered the explanation. The said explanation is not found to be false. On the contrary, it is held to be bonafide. In fact in the assessment proceedings there is no whisper about these concealment. The very fact that the assessee agreed to pay tax and did not challenge the assessment order, it is clear the conduct of the assessee cannot be construed as malafide. Therefore, the Tribunal was justified in setting aside the orders passed by the Appellate Authority as well as the Assessing Authority. In so far as the imposition of penalty is concerned, it is not in accordance with law. No fault could be found with the Tribunal for deleting the penalty.

(Para 64)

Conclusion :

Merely because the assessee agreed for addition and accordingly assessment order was passed on the basis of addition and when the assessee has paid the tax and the interest thereon in the absence of any material on record to show the concealment of income, it cannot be inferred that the said addition is on account of concealment so as to levy penalty u/s 271(1)(c).

We respectfully follow the judicial decisions and considering the facts that the assessee has accepted the addition and has not contested the quantum appeal and not submitted inaccurate particulars. Accordingly we direct the AO to delete the penalty and allow grounds of appeal of the assessee.

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

Order pronounced in the open court on this 31/08/2017.

Sd/-

(N. S. SAINI)

लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-

(PAVAN KUMAR GADALE)

न्यायिक सदस्य / JUDICIAL MEMBER

कटक Cuttack; दिनांक Dated 31/08/2017

प्र.कु.मि/PKM, Senior Private Secretary

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

1. अपीलार्थी / The Appellant-
Smt. Mira Devi Dasrapuria, Main Road,
Khurda-752055

2. प्रत्यर्थी / The Respondent-
ITO, Khurda
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कटक / DR, ITAT, Cuttack
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

(Senior Private Secretary)

आयकर अपीलीय अधिकरण, कटक / ITAT, Cuttack