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. 155/PUN/2016
निर्धारण वर्ष / Assessment Year : 2001-02

Shri Sanjay Namdeo Bharti
Malegaon Tilwan,
Tal. Baglan,
Nashik-423 301
PAN : AFGPB3719M .....अपीलार्थी / Appellant

बनाम / V/s.

The Income Tax Officer,
Ward 3(4), Malegaon .....प्रत्यर्थी / Respondent

Assessee by : Shri Sanket Joshi
Revenue by : Shri M. K. Verma

सुनवाई की तारीख / Date of Hearing : 27.09.2018
घोषणा की तारीख / Date of Pronouncement : 05.10.2018

आदेश / ORDER

PER D. KARUNAKARA RAO, AM:

This is the appeal filed by assessee against the order of CIT(A)-1, Nashik, dated 02.11.2015 for the A.Y. 2001-02.

2. Grounds raised by the assessee are extracted here as under:

"1] The learned CIT(A) erred in confirming the levy of penalty u/s.271(1)(c) in respect of the addition of Rs.5,00,000/- made by the CIT(A) on an estimated basis by rejecting the book results.

1.1] The learned CIT(A) failed to appreciate that the said addition was made on an estimated basis and hence, there was no reason to levy penalty u/s.271(1)(c) in respect of the same.

1.2] Without prejudice to the above grounds, the assessee submits that the above addition of Rs.5,00,000/- was made by the learned CIT(A) and not by the A.O. and hence, the penalty u/s.271(1)(c) should have been initiated and levied by the CIT(A) in view of the ratio laid down in the case of Manjunatha Cotton & Ginning Factory [359 ITR 565 (Kar.)] and therefore, the penalty levied by the A.O. in respect of the above addition is bad in law.

2] The learned CIT(A) erred in confirming the levy of penalty u/s.271(1)(c) in respect of the disallowance of interest u/s.36(1)(iii) of Rs.2,66,982/- made by the A.O. on the ground that the assessee had utilized loan funds for construction of shed which was transferred to the brother of the assessee.

2.1] The learned CIT(A) failed to appreciate that mere making of an incorrect claim without concealing any facts does not amount to furnishing of inaccurate particulars as held by Hon'ble S.C. in the case of Reliance Petroproducts Pvt. Ltd. [322 ITR 158] and hence, there was no reason to levy penalty u/s.271(1)(c) in respect of the above disallowance.

2.2] The learned CIT(A) erred in not appreciating that the explanation given by the assessee that 'the shed was constructed by the assessee during the year for his own business purposes, however, the same was transferred to his brother as on 31.03.2001 due to unfavorable business prospects and hence, the disallowance of interest u/s.36(1)(iii) could at the most be computed for 1 day' was plausible one and thus, there was no reason to levy penalty u/s.271(1)(c) merely because the addition was confirmed.

3. The learned CIT(A) erred in confirming the levy of penalty u/s.271(1)(c) in respect of the addition of Rs.75,000/- made u/s.68 on account of unexplained loan from brother of the assessee .

3.1] The learned CIT(A) failed to appreciate that the assessee had furnished the 7/12 extract of agricultural land admeasuring around 1 hectare 62 areas held by his brother and the addition was made merely because the assessee could not furnish evidence of sale of agricultural produce by the brother and hence, there was no reason to levy penalty u/s.271(1)(c) in view of the ratio laid down in the case of National Textiles [249 ITR 125 (Guj)].

4] The appellant craves leave to add, alter, amend or delete any of the above grounds of appeal."

3. Briefly stated relevant facts of the assessee include that the assessee is an individual and is engaged in the business of poultry farming. Assessee filed the return of income on 08-11-2011 declaring total income of Rs.84,502/- after adjusting brought forward loss of Rs.4,11,274/-. In the assessment proceedings, AO made various additions on account of (a) difference in inventory and trading account figures; (b) undervaluation of closing stock; (c) excessive and unproved expenses (d) disallowance of interest; (e) disallowance of unexplained loan taken from the brother and (f) disallowance of unexplained loans taken from 10 persons. Eventually, the AO assessed the income of the assessee at Rs.22,83,943/-. Penalty proceedings u/s.271(1)(c) of the Act are initiated and eventually, levied penalty of Rs.5,96,882/-.

4. Now the assessee filed the appeal against the against the penalty levied by the AO and partly sustained by the CIT(A). We proceed to extract the finding given by the CIT(A) here as under :

> *"5.30 In view of the above discussions, considering the facts of the case and the relevant judicial pronouncements, it is held that the penalty is to be levied on Rs.8,41,982/- u/s.271(1)(c) of the I.T. Act, 1961 for furnishing of inaccurate particulars thereby leading to concealment of income. The AO is directed to modify the penalty order accordingly."*

5. Before us, Ld. Counsel for the assessee drew our attention to the grounds, details of additions and the order of Tribunal in ITA No.710/PN/2013, dated 31-03-2016 and submitted that the additions (1) Rs.8,50,861/- on account of inflated purchases, (2) Rs.2,30,000/- on account of undervaluation of closing stock, (3) Rs.6,50,000/- on account of adhoc disallowance towards expenses debited to P&L account, (4) 2,66,982/- on account of interest u/s.36(i)(iii) of the Act, (5) Rs.75,000/- on account of addition u/s.68 of the Act and (6) Rs.2,11,000/- stands deleted/partly allowed by the order of CIT(A)/Tribunal and therefore, the levy of penalty on these additions shall not arise. Further, he submitted that these are the additions made by the AO and the penalty was initiated by the AO. Therefore, in view of the order of the Tribunal on all these additions, the penalty is unsustainable.

Further, Ld. Counsel for the assessee relied on the orders of Pune Bench of the Tribunal in the case of Arya Hybrids Seeds Ltd. Vs. DCIT in ITA No.291/PUN/2013, dated 18-01-2017 for the A.Y. 2008-09 and in the case of Aarti Govind Talerja Vs. ACIT, dated 13-12-2017 for the A.Y. 2007-08.

Referring to the way the addition of Rs.5 lakhs was confirmed by the CIT(A) in lieu of the above 3 additions, Ld. Counsel submitted that the penalty is unsustainable on this amount of Rs.5 lakhs for the reason that the said amount constitutes an estimation based on the adhoc additions. Ld. Counsel for the assessee filed the written submissions in this regard and submitted that, when the CIT(A) makes addition for the first time, the penalty on the said addition should be initiated and levied by him. The addition made by the CIT(A) cannot take back to the penalties initiated by the AO in the assessment order in any form. For this proposition, Ld. Counsel brought our attention to the order of Pune Bench in the case of Vikrant Happy Homes Pvt. Ltd. in ITA No.345/PN/2015.

6. Ld. DR for the Revenue relied heavily on the orders of AO/CIT(A).

7. We heard both the sides and perused the orders of the Revenue as well as the order of Tribunal in assessee's own case deleting the quantum additions. We have also perused the decisions relied on by the Ld. Counsel for the assessee. We find the CIT(A) vide order dated 24-01-2013 deleted the addition on account of loan of Rs.2,11,100/- taken by the assessee from 10 persons. However, the Ld.CIT(A) partly allowed the grounds n account of inflated purchases and undervaluation of closing stock restricting the addition to Rs. 5 lakhs.

7.1 In the second appeal before the Tribunal in ITA No.710/PN/2013, dated 31-03-2016, the Tribunal deleted the interest disallowance amounting to Rs.2,66,982/- u/s.36(1)(iii) and loan of Rs.75,000/-. For the sake of completeness, the finding given by the Tribunal reads as under :

> *"11. We do not find any merit in such view. The contention of the assessee that the shed was constructed with a view to expand existing business remains uncontroverted. Section 36(1)(iii) of the Act as relevant for assessment year 2001-02 provides that the amount of interest paid in respect of capital borrowed for the purpose of business or profession. The interest paid for loan utilized whether in capital field or in revenue field is irrelevant consideration. However, a proviso to section 36(1)(iii) of the Act has been inserted by the Finance Act, 2003 w.e.f. 01.04.2004 whereby any amount of interest paid in respect of capital borrowed for acquisition of assets for expansion of existing business or profession upto the date on which such capital asset is first put to use shall not be allowed as deduction. The assessee has incurred the expenditure relevant to assessment year 2001-02 when such proviso was not present in the statute. Therefore,* ***we find no justification in the action of the Revenue in resorting to the disallowance of interest expenses.*** *No disallowance is thus called for under section 36(1)(iii) of the Act. In the result, Ground No.2 of appeal of the assessee is allowed.*
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> *12.....*
> *.....*
> *We do not find any substance in the premise taken by the CIT(A) in sustaining the addition. The assessee has furnished the confirmation letter as well as 7/12 extracts concerning the agricultural land showing the agricultural activity. This, in our view, is plausible and reasonable evidence to support the source in the hands of the lender. It is common knowledge that the agricultural produce are sold in cash. The impugned loan is very small having regard to the agricultural land available for cultivation.* ***In view of these facts and considering the totality of circumstances of the case, the bonafides of loan of Rs.75,000/- received from agriculturist brother deserves to be accepted.*** *Accordingly, Ground No.3 of appeal of the assessee is allowed."*

7.2 We concur with the arguments of Ld. Counsel for the assessee that when the CIT(A) makes addition for the first time, the penalty on the said addition should be initiated and levied by him. We find the Tribunal in the case of Vikrant Happy Homes Pvt. Ltd. (supra), had an occasion to decide a somewhat identical issue and the same reads as under :

> *"22. The CIT(A) after striking down the addition on estimate basis of on-money receipts has further gone to hold that in assessment year 2007-08, sum of Rs.12 lakhs is to be added in the hands of assessee, on the basis of statement recorded of assessee during the course of search under section 132(4) of the Act, wherein the assessee had admitted receipt of on-money of Rs.12 lakhs and in the statement recorded under section 132(4) of the Act, had offered the said amount in his hands for financial year 2006-07. However, while filing the return of income, the same was offered in assessment year 2008-09. The CIT(A) in such circumstances, held that sum of Rs.12 lakhs is to be added in the hands of assessee in assessment year 2008-09. This was a fresh addition made by the CIT(A) on the basis of statement of assessee on account of on-money, but the same had no relevance to the estimation made by the Assessing Officer.* ***In such circumstances, where the addition has been sustained on a ground other***

> ***than the ground on which the addition was made, then penalty proceedings under section 271(1)(c) of the Act initiated on original additions do not stand.*** *The CIT(A) had the power to initiate penalty proceedings on the addition made by him in assessment year 2007-08, however, he failed to do so and under the circumstances, the assessee cannot be held to have furnished inaccurate particulars of income or concealed the income in respect of addition of Rs.12 lakhs, which is ultimately sustained in the hands of assessee. Accordingly, we direct the Assessing Officer to delete the penalty levied under section 271(1)(c) of the Act on addition of Rs.12 lakhs in assessment year 2007-08."*

Considering the above settled legal position on the issue of requirement of initiation of penalty as well as levy of penalty by the CIT(A) who makes the addition for the first time on new grounds, the penalty stands unsustainable on technical grounds. In any case, the addition of Rs.5 lakhs constitutes adhoc addition based on the estimations. On this ground also, assessee gets relief.

7.3 We find the Tribunal in the case of Arya Hybrids Seeds Ltd. Vs. DCIT in ITA No.291/PUN/2013, dated 18-01-2017 also had an occasion to delete the penalty u/s.271(1)(c) of the Act. We proceed to reproduce the findings given by the Tribunal here as under :

> *"5. We have heard the submissions made by the representatives of rival sides and have perused the orders of the authorities below. It is an undisputed fact that the assessee has not contested the additions made during the assessment proceedings. It is a trite law that levy of penalty is not automatic and every addition made during the assessment proceedings need not necessarily result in levy of penalty. The Hon'ble Supreme Court of India in the case of Commissioner of Income Tax Vs. Khoday Eswarsa and Sons reported as 83 ITR 369 has held that the assessment proceedings and penalty proceedings are two independent and separate proceedings. The Hon'ble Bombay High Court in the case of Commissioner of Income Tax Vs. Dharamchand L. Shah reported as 204 ITR 462 has held :*
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> > *"It is by now trite law that the assessment proceedings and penalty proceedings are two separate and distinct proceedings. The fact that certain additions were made in the assessment proceedings would not automatically justify the Revenue to impose penalty under section 271(1)(c) of the Act."*
>
> *Thus, any addition made during assessment ipso facto would not result in levy of penalty.*

6. In the present case, we find that the Assessing Officer during assessment proceedings has made addition in respect of shortage in stock and unrecorded investment on estimation. It was pointed by the ld. DR that the assessee had agreed for addition. Addition on the basis of estimation may be sustainable in assessment proceedings but criterion and yardstick for imposing penalty u/s. 271(1)(c) of the Act are different from these applied for making the additions. It is a well settled law that no penalty u/s. 271(1)(c) should be levied where additions are made on estimations. Further, no penalty u/s. 271(1)(c) can be levied merely on the ground that the assessee has agreed for the addition.

7. We find that similar view was taken by the Mumbai Bench of the Tribunal in the case of ITO Vs. C. Chhotolal Textiles (P.) Ltd. reported as 95 TTJ 436. In the said case, during survey discrepancy in stock was found on physical verification. The assessee agreed for the addition. The Assessing Officer assessed the income by making addition on account of low GP and on account of certain purchases not accounted in stock register. The Assessing Officer also levied penalty u/s. 271(1)(c) of the Act on said addition. On appeal Commissioner of Income Tax (Appeals) cancelled the penalty. The Department carried the matter in second appeal before the Tribunal. The Tribunal upheld the order of Commissioner of Income Tax (Appeals) by observing as under :

> *"The case of the assessee is that it has agreed to the addition made only to buy peace with the Department and that too on a condition that penalty under section 271(l)(c) of the Act shall not be levied on the assessee. The penalty has also been levied for trading addition on account of low GP which is based on estimation only and hence not sustainable. We find that similar additions made in the other group cases of the assessee were deleted by the CIT(A) and the Revenue has not filed an appeal to the Tribunal. We find that the assessee has filed confirmation regarding the purchase of cloth from M/s Royal Fabrics, Mumbai, wherein their income-tax file number, is also mentioned. In the facts of the case, we find that material pointed out by the Revenue may be sufficient to sustain the addition in the quantum case but is not sufficient to penalise the assessee under section 271(l)(c) of the Act for concealment of income. We are unable to agree with the learned Departmental Representative that the decision of the Hon'ble Apex Court in [2001] 251 ITR 99 (SC) (supra) shall be applied being later in time than the decision of Hon'ble Apex Court in [2001] 251 ITR 9 (SC) (supra) for the reason that both the decisions of the Hon'ble Apex Court were declared on different grounds. We are also not impressed with the argument of the learned Departmental Representative that the decision of the Hon'ble Apex Court in [2001] 251 ITR 9 (SC) (supra) does not lay down any law. The Hon'ble Apex Court has delivered this judgment in civil appeals after considering all the facts and circumstances of the case and after reading the High Court order and the statement of the case. We hold that the decision of Hon'ble Apex Court in Suresh Chandra Mittal case (supra) lays down the law on the issue before the Hon'ble Court. In the facts and circumstances of the case and in accordance with law applicable thereto, we hold that the CIT(A) has rightly cancelled the penalty imposed under section 271(l)(c) and accordingly we dismiss the ground of appeal of the Revenue."*

8. Thus, in view of the facts of the case and the case laws discussed above, we set aside the impugned order and direct the Assessing Officer to cancel the penalty."

7.4 Thus, the penalty levied originally by the AO stands deleted as they no longer exists. CIT(A) deleted the same. Further, the penalty levied on the addition of Rs.5 lakhs sustained by the CIT(A), will be unsustainable in law as the relevant penalty proceedings should have been initiated by the CIT(A) only as the addition of Rs.5 lakhs is his creation. Considering all the aspects mentioned above, we are of the considered opinion that the penalty levied by the AO is required to be quashed. We accordingly order the AO to delete the same. Grounds raised by the assessee are allowed.

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

Order pronounced on 05th day of October, 2018.

Sd/- Sd/-

(विकास अवस्थी /VIKAS AWASTHY) (डी. करुणाकरा राव/D. KARUNAKARA RAO)
न्यायिक सदस्य/JUDICIAL MEMBER लेखा सदस्य/ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 05th October, 2018.
Satish

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT (Appeals)-1, Nashik
4. The Pr. CIT-1, Nashik.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "**बी**" बेंच, पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.