

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : SMC : NEW DELHI
BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER**

ITA No.5500/Del/2018
Assessment Year : 2015-16

Neelam Rani Verma,
C/o Panwar Pathology Lab,
Hanuman Tila, Shamli Road,
Shamli, UP.

Vs. ITO,
Ward-1(4),
Shamli.

PAN: AEIPV1748Q

ITA No.5501/Del/2018
Assessment Year : 2015-16

Kanwar Pal Singh,
C/o Panwar Pathology Lab,
Hanuman Tila, Shamli Road,
Shamli, UP.

Vs. ITO,
Ward-1(4),
Shamli.

PAN: BCNPS5303N

(Appellant)

(Respondent)

Assessee by : Shri Nirbhay Mehta, CA
Revenue by : Shri S.L. Anuragi, Sr. DR

Date of Hearing : 20.02.2019
Date of Pronouncement: 25.02.2019

ORDER

The above two appeals filed by the respective assesseees are directed against the separate orders dated 28th June, 2018 of the CIT(A), Muzaffarnagar, relating to assessment year 2015-16.

2. Since identical grounds have been taken by the respective assesseees in these appeals, therefore, these were heard together and are being disposed of by this common order for the sake of convenience.

3. First we take up ITA No.5501/Del/2018. Facts of the case, in brief, are that the assessee filed return of income on 7th February, 2016 declaring total taxable income of Rs.5,97,690/-. Subsequently, the case of the assessee was selected for scrutiny and statutory notices were issued. The assessee appeared from time to time and, thereafter, the Assessing Officer completed the assessment u/s 143(3) on 29.11.2017 determining the total income at Rs.23,16,540/- wherein he made addition of Rs.11,87,719/- on account of derivative trading, Rs.3,12,000/- out of salary to staff, Rs.1,16,850/- under the head 'Travelling expenses', Rs.44,630/- out of training expenses and Rs.57,650/- out of depreciation. Subsequently, the Assessing Officer initiated penalty proceedings u/s 271(1)(c) of the IT Act. Rejecting the various explanations given by the assessee, the Assessing Officer levied penalty of Rs.4,89,686/- being 100% of the tax sought to be evaded.

3.1 In appeal, the Id.CIT(A) upheld the action of the Assessing Officer by observing as under:-

“6. In the course of assessment proceedings it was noted by the AO that the appellant has not shown income from trading in future & options for Rs. 1718849/-. The AO has thus made addition of Rs. 1718849/- to the returned income of the appellant and initiated penalty proceedings u/s 271(1)(c) of the Act for concealing the particulars of income and for furnishing of inaccurate particulars of income. The AO has further levied penalty u/s 271(1)(c) of the Act by relying upon Explanation 1(B) to section 271(1)(c) for concealing the particulars of income for Rs.4,89,686/-. The appellant during the penalty proceedings has stated that income from trading in future & options could not be

shown due to ignorance and due to bona fide mistake. The appellant further stated that there were no mala fide intentions. The submission of the appellant is a part of statement of facts.

The facts of the case along with material on record have been gone through. It is noted that the appellant has derived income from trading in future & options which has not been disclosed in the return of income. The appellant is a professional doctor and ignorance of law cannot be ground for justification/explanation for not showing the above income in the return. The case of the appellant is covered by Explanation 1(B) to section 271(1)(c) of the Act. It is noted that the appellant has concealed the particulars of income of this account. There is no reasonable cause in the case of the appellant as provided u/s 273B of the Act. Under the facts it is held that the AO was justified to levy penalty u/s 271(1)(c) of the Act. The same is hereby confirmed. Grounds of appeal Nos.1 & 6 are dismissed.”

4. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal raising the following grounds:-

1. That on the facts and circumstances of the case and in law, the order passed by CIT (A), Muzafernagar (hereinafter referred to as CIT (A)), is bad in law.

2. That on the facts and circumstances of the case , the CIT-A was not justified in upholding the order imposing penalty as the assessing officer failed to record requisite satisfaction in the assessment order for initiation of penalty proceedings,

3. That on the facts and circumstances of the case, the CIT-A was not justified in upholding the action of the AO for imposing the penalty u/s 271(1) (c) since there is no clear cut finding in the penalty order as to imposition of penalty is for concealment of income or for furnishing inaccurate particulars of income by the appellant,

4. That on the facts and circumstances of the case, the CIT-A was not justified in upholding the action of the AO for imposing the penalty u/s 271(1) (c) of Rs.4,89,686/-(100% of the tax sought to be evaded) ignoring the fact that the appellant had voluntarily offered to tax the income from F&O transactions emanating from portfolio management services availed by it from SMC Financial Services.

5. That the appellant craves leave to add, alter, modify any of the grounds at

the time of hearing or before the hearing.”

5. The ld. counsel, at the outset, filed a copy of the notice issued u/s 271(1)(c) of the IT Act dated 29.11.2017. Referring to the same, he submitted that the Assessing Officer has not struck off the inappropriate words from the said notice i.e., he has not specified under which limb of the provisions i.e., whether for concealment of the particulars of income or furnishing of inaccurate particulars of such income the penalty has been levied. Referring to various decisions of the Tribunal and the decision of the Hon'ble Karnataka High Court in the case of *Manjunath Cotton Mills reported in 359 ITR 565 (Kar)*, he submitted that if the Assessing Officer does not strike off the inappropriate words from the notice, then, levy of penalty u/s 271(1)(c) is not justified since it is not known under which limb of the provision the penalty has been levied. Further, the Assessing Officer in the assessment order has not reached requisite satisfaction as to whether the initiation of penalty is on account of concealment of income or furnishing of inaccurate particulars of income. Referring to the decision of the Hon'ble Delhi High Court in the case of *CIT vs. Rampur Engineering Co. Ltd., reported in 309 ITR 143 (Del)*, he submitted that the Hon'ble High Court in the said decision has held that the power to impose penalty u/s 271(1)(c) depends upon the satisfaction of the ITO in the course of the proceedings under the Act. He drew the attention of the Bench to para 9 of the said order which reads as under:-

“ 9. In our opinion, the legal position is well settled in view of the Supreme Court decisions in Commissioner of Income Tax, Madras. and Anr. v. S.V. Angidi Chettiar (supra) and D.M. Manasvi v. Commissioner of Income Tax, Gujarat, II

Ahmedabad (supra), that power to impose penalty under Section 271 of the Act depends upon the satisfaction of the Income Tax Officer in the course of the proceedings under the Act. It cannot be exercised if he is not satisfied and has not recorded his satisfaction about the existence of the conditions specified in clauses (a), (b) and (c) before the proceedings are concluded. It is true that mere absence of the words "I am satisfied" may not be fatal but such a satisfaction must be spelt out from the order of the Assessing Authority as to the concealment of income or deliberately furnishing inaccurate particulars. In the absence of a clear finding as to the concealment of income or deliberately furnishing inaccurate particulars, the initiation of penalty proceedings will be without jurisdiction. In our opinion, the law is correctly laid down in Ram Commercial Enterprises (supra) and we are in respectful agreement with the same. The reference is answered accordingly.”

6. He accordingly submitted that the penalty levied by the Assessing Officer is not justified. He also relied on the decision of the Hon'ble Delhi High Court reported in *Ms Madhushree Gupta vs. Union of India (2009) 317 ITR 107 (Del)*.

7. The ld. DR, on the other hand, heavily relied on the order of the CIT(A). He submitted that the assessee has not taken such grounds before the lower authorities, therefore, he should not be permitted to argue on this aspect. Since the assessee has concealed particulars of income and has furnished inaccurate particulars by not disclosing his true income, the CIT(A) is fully justified in confirming the penalty levied by the Assessing Officer.

8. I have considered the rival arguments made by both the sides and perused the orders of the authorities below. I have also considered various decisions cited before me. A perusal of the notice issued u/s 274 read with section 271 of the IT Act dated 29.11.2017 shows that the Assessing Officer has not struck off the inappropriate words in the said notice. While imposing the penalty, the Assessing Officer did not mention

under which limb of the provision the penalty has been initiated i.e., for concealment of income or for furnishing of inaccurate particulars of income or for both. The notice mentions as under:-

“* Have concealed the particulars of your income or furnished inaccurate particulars of such income.”

9. The coordinate Benches of the Tribunal are taking the consistent view that where the Assessing Officer has not struck off the inappropriate words in the notice issued u/s 274 read with section 271 of the IT Act, then penalty u/s 271(1)(c) is not justified. I find identical issue had come up before the Tribunal in the case of Yum ! Restaurants Marketing Pvt. Ltd. vs. ITO vide ITA Nos. 894, 895, 896/Del/2013, order dated 28th June, 2017, for assessment years 2006-07, 2002-03 and 2003-04 respectively (to which I am a party), the Tribunal has cancelled the penalty so levied by observing as under:-

“10. We have heard both the parties and perused the orders passed by the Revenue Authorities along with the relevant records available with us. Firstly, we have perused the assessment order dated 11.10.2010 passed u/s. 143(3) of the Act and found that AO while completing the assessment has not recorded the satisfaction and has not initiated the penalty proceedings. Similarly, at the time of imposing the penalty u/s. 271(1)© of the Act, the AO has levied the penalty, but did not mention under which limb the penalty has been imposed whether it is on account of inaccurate particulars of income or concealment of income. Therefore, the entire penalty proceedings stand vitiated. In view of above, the penalty is not sustainable in the eyes of law. Our aforesaid view is fortified by the following decisions:-

- i) “CIT & Anr. Vs. M/s SSA’s Emerald Meadows – 2015 (11) TMI 1620 – Karnataka High Court has held that Tribunal has correctly allowed the appeal filed by the assessee holding the notice issued by the Assessing Officer under section 274 read with Section 271(1)(c) to be bad in law as it did not specify which limb of Section 271(1)©

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) (7) TMI 620-Karnataka High Court. Thus 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 – decided in favour of assessee.”

- ii) CIT & Anr. Vs. M/s SSA’s Emerald Meadows – Hon’ble Supreme Court of India – reported in 2016 (8) TMI 1145 – Supreme Court. The Apex Court held that High Court order confirmed (2015) (11) TMI 1620 (Supra) – Karnataka High Court. Notice issued by AO under section 274 read with section 271(1)(c) to be bad in law as it did not specify which limb of Section 271(1)© 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 – Decided in favour of assessee.”

10.1 In the background of the aforesaid discussions and respectfully following the precedents, we delete the penalty in dispute and decide the issue in favor of the assessee and against the Revenue.”

10. Since the facts of the impugned appeal are identical to the facts of the case decided by the Tribunal in the case of Yum ! Restaurants Marketing Pvt. Ltd. (supra), therefore, respectfully following the same, I cancel the penalty so levied by the Assessing Officer and upheld by the CIT(A) due to non-striking off the inappropriate words in the notice. The grounds raised by the assessee are allowed.

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11. The grounds raised by the assessee read as under:-

1. That on the facts and circumstances of the case and in law, the order passed by CIT (A), Muzafarnagar (hereinafter referred to as CIT (A)), is bad in law.
2. That on the facts and circumstances of the case , the CIT-A was not

justified in upholding the order imposing penalty as the assessing officer failed to record requisite satisfaction in the assessment order for initiation of penalty proceedings,

3. That on the facts and circumstances of the case, the CIT-A was not justified in upholding the action of the AO for imposing the penalty u/s 271(1) (c) since there is no clear cut finding in the penalty order as to imposition of penalty is for concealment of income or for furnishing inaccurate particulars of income by the appellant,

4. That on the facts and circumstances of the case, the CIT-A was not justified in upholding the action of the AO for imposing the penalty u/s 271(1) (c) of Rs.57,375/-(100% of the tax sought to be evaded) ignoring the fact that the appellant had voluntarily offered to tax the income from F&O transactions emanating from portfolio management services availed by it from SMC Financial Services.

5. That the appellant craves leave to add, alter, modify any of the grounds at the time of hearing or before the hearing.”

12. After hearing both the sides, I find the grounds raised by the assessee in this appeal are identical to the grounds raised in ITA No.5501/Del/2018. I have already decided the issue in the preceding paragraphs and the grounds raised by the assessee have been allowed. Following similar reasonings, the grounds raised by the assessee are allowed.

13. In the result, both the appeals are allowed.

The decision was pronounced in the open court on 25.02.2019.

Sd/-

(R.K. PANDA)
ACCOUNTANT MEMFBER

Dated: 25th February, 2019

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Copy forwarded to

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi