

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "SMC" : DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER

ITA.Nos.1765 & 2049/Del./2018
Assessment Years 2007-2008 & 2008-2009

Shri Rajesh Kumar, Prop. Rajesh Const. Co. H.No.10, New Anaj Mandi, Indri Karnal. PAN ADNPK5057H	vs.	The Income Tax Officer, Ward-4, Karnal.
(Appellant)		(Respondent)

For Assessee :	Shri Rakesh Jain, Advocate.
For Revenue :	Shri S.L. Anuragi, Sr. D.R.

Date of Hearing :	25.02.2019
Date of Pronouncement :	05.03.2019

ORDER

Both the appeals by the same assessee are directed against the different orders of the Ld. CIT(A), Karnal dated 29th December, 2017, for the assessment year 2007-2008, and dated 29th January, 2018, for the assessment year 2008 2009, challenging the levy of penalty under section 271(1)(c) of the Income Tax Act, 1961.

2. We have heard the Learned Representatives of both the parties and perused the material available on record. Both the appeals are decided as under

ITA.No.1765/Del./2018 – A.Y. 2007 2008 :

3. The A.O. in the penalty order noted that assessee filed return of income at Rs.2,14,211/-. The assessee was directed to produce books of account, bills and vouchers etc., but not produced. Therefore, the A.O. framed ex-parte assessment order under section 144 of the Income Tax Act, by rejecting the books of account of assessee under section 145(3) of the Income Tax Act. The net profit @ 12% on the gross contractual receipts was applied and income was taken at Rs.19,85,207/- from business and civil construction. The assessing officer accordingly initiated the penalty proceedings under section 271(1)(c) of the Income Tax Act.

4. The assessee preferred an appeal against the assessment order before the Ld. CIT(A) who has restricted the addition by applying net profit rate of 8% of gross

receipts, excluding cost of material supplied and sales tax, subject to verification and the addition was restricted to Rs.11,12,058/-. The assessing officer accordingly levied the penalty on this addition, which is confirmed by the Ld. CIT(A) by dismissing the appeal of assessee.

5. Learned Counsel for the Assessee, at the outset, submitted that penalty is levied merely by making addition by applying higher profit rate and estimating the income of the assessee. It is, therefore, not a case of concealment of income or furnishing inaccurate particulars of income. He has relied upon following decisions :

- (i) CIT vs. Sangrur Vanaspati Mills Ltd., (2008) 303 ITR 53 (P&H)
- (ii) Harigopal Singh vs. CIT (2002) 258 ITR 85 (P&H)
- (iii) Order of ITAT, SMC Bench, Dated 16.06.2016 in the case of Zamindara Timber Traders, Karnal vs. ITO, Ward-1, Karnal in ITA.No.2964/D/2014.

6. On the other hand, Ld. D.R. relied upon the orders of the authorities below.

7. I have considered the rival submissions. It is well settled Law that provisions of Section 271(1)(c) are not attracted to a case where income of assessee is assessed on estimate basis and additions are made therein on that basis. In the present case, for non-production of books of account and the details, A.O. rejected the books of accounts under section 145(3) of the Income Tax Act and applied higher net profit rate at 12% against the contractual receipt to make the addition. However, the Ld. CIT(A) reduced the application of the net profit rate to 8% by excluding cost of material supplied and sales tax. Therefore, it is not a case of concealment of income or furnishing of inaccurate particulars. The assessing officer made estimated addition which is reduced by the Ld. CIT(A) substantially. Therefore, the decisions relied upon by Learned Counsel for the assessee apply to the facts and circumstances of the case. Since no definite finding of fact have been given for concealment of income or furnishing inaccurate particulars of income and income is merely estimated, therefore, I am of

the view that penalty is not leviable. I set aside the Orders of the authorities below and cancel the penalty.

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

ITA.No.2049/Del./2018 – A.Y. 2008-2009 :

9. The A.O. in the penalty order similarly noted that books of account of assessee were rejected under section 145(3) of the I.T. Act and profit rate of 8% was applied for the purpose of estimating the income. Show cause notice dated 13.12.2010 was issued before levy of the penalty and the A.O. ultimately levied the penalty against the assessee. The Ld. CIT(A) dismissed the appeal of assessee.

10. Learned Counsel for the Assessee, at the outset, submitted that show cause notice issued on dated 13.12.2010 before levy of the penalty provides as under :

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

10.1. He has, therefore, submitted that A.O. has not mentioned in the show cause notice that as to under which limb of Section 271(1)(c) of the I.T. Act, the penalty is proposed to be levied i.e., whether for concealment of income or for furnishing the inaccurate particulars of income. He has, therefore, submitted that penalty is not leviable.

11. On the other hand, Ld. D.R. relied upon the Orders of the authorities below.

12. After considering the rival submissions, I am of the view that the issue is covered by the Order of ITAT, Delhi G-Bench, in the case of M/s. M.M. Industries, NIT, Faridabad, vs. ITO, Ward-II(4), Faridabad in ITA.No.1301/Del./2016, Dated 31.01.2019 in which it was held as under :

*IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "G" : DELHI*

BEFORE SHRI BHAVNESH SAINI, J.M. & SHRI O.P. KANT, A.M.

*ITA.No.1301/Del./2016
Assessment Year 2007-2008*

<i>M/s. M.M. Industries, NIT Faridabad. PAN AALFM2320G C/o. RRA Taxindia, D-28, South Extension, Part-1, New Delhi-110049.</i>	<i>Vs</i>	<i>Income Tax Officer, Ward-II(4), Faridabad.</i>
<i>(Appellant)</i>		<i>(Respondent)</i>

<i>For Assessee :</i>	<i>Shri Somil Aggarwal, Advocate.</i>
<i>For Revenue :</i>	<i>Shri N.K. Bansal, Sr. D.R.</i>

<i>Date of Hearing :</i>	<i>30.01.2019</i>
<i>Date of Pronouncement :</i>	<i>31.01.2019</i>

ORDER

PER BHAVNESH SAINI, J.M.

This appeal by assessee has been directed against the order of the Ld. CIT(A), Faridabad, Dated 28.01.2016, for the A.Y. 2007-2008 challenging the levy of penalty under section 271(1)(c) of the I.T. Act, 1961.

2. *Briefly the facts of the case are that assessee is a firm and filed return of income declaring income of Rs.1,40,030/-. The A.O. examining the books of account and details, made certain additions against the assessee in a sum of Rs.16,03,830/- and assessed the total income at Rs.17,43,860/-. The A.O. in the*

assessment order noted that penalty proceedings under section 271(1)(c) of the I.T. Act, 1961, has been initiated separately for furnishing inaccurate particulars and concealing the income. The A.O. vide separate Order levied the penalty under section 271(1)(c) of the I.T. Act, 1961 on the concealed income. The Tribunal vide Order dated 18.03.2015 allowed the appeal of assessee for statistical purposes and remit the matter back to the Ld. CIT(A) for adjudication. The Ld. CIT(A) noted that he has allowed part relief to the assessee vide his Order dated 27.02.2016 and on the balance amount penalty was confirmed.

3. *Learned Counsel for the Assessee, at the outset, submitted that the A.O. has issued show cause notice under section 274 r.w.s.271 of the I.T. Act Dated 29.12.2009 before levy of the penalty in which the A.O. has mentioned as follows:*

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

3.1. *He has submitted that A.O. has not specified in which limb of Section 271(1)(c) of the Act, the penalty have been levied. Therefore, the issue is covered by the Judgment of Hon'ble Karnataka High Court in the case of CIT vs. M/s. SSAs Emerald Meadows 73 taxmann.com 241, which is confirmed by the Hon'ble Supreme Court reported in 73 taxmann.com 248.*

4. *The Ld. D.R. on the other hand, submitted that the assessee did not raise this issue specifically before the authorities below. Therefore, new point should not be allowed to be raised at this stage.*

5. *After considering the rival submissions, we are of the view that penalty is not leviable in the matter. The Hon'ble Karnataka High Court in the case of CIT vs. M/s. SSAs Emerald Meadows 73 taxmann.com 241 confirmed the Order of the Tribunal in which the Tribunal has allowed the appeal filed by assessee holding that notice issued by the A.O. under section 274 r.w.s. 271(1)(c) of the I.T. Act, 1961, to be bad in Law and it did not specify in which limb of Section 271(1)(c)*

of the I.T. Act, 1961, the penalty proceedings had been initiated i.e., whether for concealment of particulars of income or furnishing inaccurate particulars of income. The decision of Hon'ble Karnataka High Court in the case of CIT vs. M/s. SSAs Emerald Meadows (supra) have been confirmed by the Hon'ble Supreme Court reported in 73 taxmann.com 248 by dismissing the SLP of the Department. In the present case, the A.O. issued show cause notice dated 29.12.2009 which is also mentioned in the penalty order in which A.O. has put the column blank which did not specify under 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 inaccurate particulars of income. Even in the assessment order A.O. did not mention as to under which limb of Section 271(1)(c) of the Act, the penalty have been initiated against the assessee as noted above. Therefore, the show cause notice for levy of the penalty itself is invalid and bad in law and as such the

resultant proceedings have been vitiated. Once the assessee challenged the assumption of jurisdiction of the A.O. it would include the validity of the show cause notice which is mandatory before levy of the penalty. Since the notice itself is not legal, therefore, no penalty could be levied against the assessee. We, accordingly, set aside the Orders of the authorities below and cancel the penalty.

6. *In the result, appeal of assessee is allowed.”*

12.1. Following the same, I set aside the Orders of the authorities below and cancel the penalty.

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

14. To sum-up, both the appeals of the Assessee are allowed.

Order pronounced in the open Court.

Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

Delhi, Dated 05th March, 2019

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT 'SMC' Bench, Delhi
6.	Guard File.

// BY Order //

Assistant Registrar : ITAT Delhi Benches :
Delhi