

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'SMC', NEW DELHI**

BEFORE SH. R.K PANDA, ACCOUNTANT MEMBER

ITA No.5655 /Del/2018
Assessment Year: 2003-04

Neha Toka Pvt. Ltd. A-9, ARyanagar Apartments, Patparganj, New Delhi (APPELLANT)	Vs	Income Tax Officer Ward- 18 (1), New Delhi (RESPONDENT)
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ITA No.5656/Del/2018
Assessment Year: 2003-04

M/s. Neha Ispat Pvt. Ltd. A-9, ARyanagar Apartments, Patparganj, New Delhi (APPELLANT)	Vs	Income Tax Officer Ward- 18 (1), New Delhi (RESPONDENT)
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Appellant by	Ms. Rano Jain, Advocate Shri Pranshu Singhal, CA
Respondent by	Shri Amit Jain, Sr. DR

Date of hearing:	13/03/2019
Date of Pronouncement:	28/03/2019

ORDER

PER R.K. PANDA, AM:

1. The above two appeals filed by the respective assesseees are directed against the separate orders dated 13.06.2018 of the CIT(A)-28, New Delhi relating to A.Y. 2003-04. Since identical grounds have been taken by the respective assesseees in their appeals, therefore, these were heard together and are being disposed of by this common order for the sake of convenience.

2. In both the appeals the respective assesses have challenged the order of the CIT(A) in confirming the penalty levied by the Assessing Officer u/s 271 (1) (c) of the IT Act.

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3. The facts of the case, in brief, are that the assessee is a company and filed its return of income on 30.10.2003 declaring nil income. The case of the assessee was reopened by issue of notice u/s. 148. The AO passed the order u/s. 254/143 (3) determining the total income at Rs.1025000/- wherein he made addition of Rs.10 lakhs u/s 68 of the IT Act on account of share capital receipt from different persons and an amount of Rs.25,000/- being commission paid for arranging the accommodation entries. The Assessing Officer thereafter initiated penalty proceedings u/s 271 (1) (c) of the IT Act. Rejecting the various explanation given by the assessee, the Assessing Officer levied penalty of Rs.3,71,690/- u/s 271 (1) (c) of the IT Act. In appeal the Ld. CIT(A) confirmed the penalty so levied by the Assessing Officer.

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

1. *On the facts and circumstances of the case, the order passed by the Learned CIT(A) is bad both in the eye of law and on facts.*

2. *On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the penalty of Rs.3,76,990/- imposed by the AO.*

3. *(i) On the facts and circumstances of the case, the show cause notice u/s 274 r.w.s 271 of the act issued by Id. AO is*

invalid in law as the same does not mention any specific charge as to the concealment of income or furnishing of inaccurate particulars of income.

(ii) That the Id. CIT(A) has erred both on facts and in law in confirming the penalty imposed on the basis of invalid notice and as such the same is liable to be quashed.

4. *On the facts and circumstances of the case, the Id. CIT(A) has erred both on facts and in law in confirming the penalty ignoring the fact mere disallowance or additions per se cannot be the basis for imposing the penalty u/s 271(l)(c) of the Act.*

5. *On the facts and circumstances of the case, the said action of the CIT(A) is bad in law in upholding the penalty u/s 271(l)(c) of the act ignoring the fact that penalty proceedings are independent of the assessment proceedings.*

6. *On the facts and circumstances of the case, the Id. CIT(A) has erred both on facts and in law in confirming the penalty so imposed in complete ignorance of detailed explanation and submissions furnished before him that neither there is concealment of income nor furnishing of inaccurate particulars of income.*

7. *On the facts and circumstances of the case, the Id. CIT(A) has erred both on facts and in law in confirming the penalty u/s 271(l)(c) so imposed without giving any findings on the merits of the case regarding concealment of income or furnishing of inaccurate particulars of income*

5. The Ld. Counsel for the assessee at the outset filed a copy of the notice issues u/s 274 r.w.s. 271 (1) (c) of the IT Act dated 23.02.2016 and another notice on 08.03.2016 and submitted that the Assessing Officer has not deleted the inappropriate

words in the said notice. Therefore, it is not clear as to under which limb of provisions of section 274 r.w.s. 271 (1) (c) of the IT Act, the penalty proceedings are initiated. Referring to series of decisions she submitted that where the Assessing Officer has not struck off the inappropriate words in the notice, the penalty levied is not sustainable. She relied on the following decisions:-

1. H. N. Ice and Storage Pvt. Ltd. Vs. DCIT, Circle 12 (1), New Delhi ITA No.926/Del/2018, ITAT Delhi.
2. Sanjay Mittra Vs. DCIT, ITA No.5206/Del/2016, ITAT Delhi
3. YKM Holdings Pvt. Ltd. Vs. ITO, Ward – 18 (14), ITA No.2174/Del/2016, ITAT Delhi.
4. Neelam Rani Kanwar Pal Singh Verma Vs. ITO, Ward – 1 (4), ITA No.5500 & 5501/Del/2018, ITAT Delhi.
5. Sahiwal Investments & Trading Co. Vs. ITO Ward 22 (2) ITA No.4913/Del/2015, ITAT Delhi.
6. Vidyannath Urban Co-operative Bank Ltd. Vs. ACIT, ITA no.2078 & 2079/Pun/2014, ITAT Pune
7. New Era Infrastructure Pvt. Ltd. Vs. CIT (A)-6, New Delhi ITA No.836/Del/2016, ITAT Delhi.
8. Roots Education (P) Ltd. Vs. ITO ITA No.1368/Del/2016, ITAT Delhi.
9. A. C. Goods Transport P. LTd. Vs. ACIT, ITA No.2428/Del/2015, Delhi

She accordingly submitted that the penalty levied by the Assessing Officer and upheld by the CIT(A) is not sustainable.

6. The Ld. DR on the other hand strongly opposed the arguments advanced by the Ld. Counsel for the assessee and relied on the order

of the Id. CIT(A) confirming the penalty so levied by the Assessing Officer.

7. Referring to the decision of the Hon'ble Madras High Court in the case of Sundaram Finance Ltd. vs. CIT reported in 403 ITR 407, he submitted that the Hon'ble High Court in the said decision has held that where notice did not show nature of default, it was a question of fact. The assessee had understood the purport and import of notice and hence no prejudice was caused to the assessee. The Hon'ble High Court in this decision has considered the decision of the Hon'ble Karnataka High Court in the case of CIT vs. Manjunatha Cotton & Ginning Factory reported in 359 ITR 565.

8. Referring to the decision of the Hon'ble Bombay High Court in the case of CIT vs. Smt. Kaushalya reported in 216 ITR 660 he submitted that the Hon'ble High Court in the said decision has held that mere mistake in language used or mere non-striking off of inaccurate portion cannot by itself invalidate the notice u/s 274 of the I.T. Act. It was accordingly held that the penalty orders passed by the ITO for assessment years 1968-69 to 1969-70 were perfectly valid and there was no justification for quashing the same on ground of absence of jurisdiction. He also relied on various other decisions to the proposition that mere non-striking off of inappropriate words does not invalidate the penalty proceedings.

9. The Id. counsel for the assessee, in his rejoinder, submitted that if two views are possible on an issue, the view which is favourable to the assessee has to be followed. For the above provision, he relied on the decision of the Hon'ble Supreme Court in the case of Vegetable Products Limited reported in 88 ITR 192. Referring to following decisions, he submitted that section 292BB would not come

to the rescue of the revenue when the notice was not in substance and in conformity with or according to the intent of the I.T Act:-

i'. **Shri Sachin Arora, ITA No.118/Agra/2015 dated 19.12.2017.**

ii. **Dr. Sarita Milind Davare, 184.TTJ 9.**

iii. **Shri K. Prakash Shetty, ITA No.265 to 267/2014 dated 05.06.2014.**

10. I have considered the rival arguments made by both the sides and perused the orders of the authorities below. I find from the notice issued u/s 274 r.w.s. 271 (1) (c) of the IT Act that the inappropriate words in the said notice have not been struck off. I find the coordinate bench of the Tribunal in the case of Sanjay Mitra Vs. DCIT has decided an identical issue and the penalty so levied by the Assessing officer and upheld by the CIT(A) has been deleted. The relevant observation of the Tribunal from para 15 onwards read as under :-

15. We have considered the rival arguments made by both the sides and perused the material available on record. We have also considered the various decisions cited before us. We find the only issues to be decided in the grounds of appeal is regarding the sustainable of penalty levied u/s 271 (1) © when the inappropriate words in the notice issued u/s 274 r.w.s. 271 have not been struck off. A perusal of the notice issued u/s 274 r.w.s. 271 dated 30.03.2004 shows that the in appropriate words in the said notice have not been struck off and it is a printed notice. Even the last line of

the said notice only speaks of section 271 and does not even mention of section 271 (1) (c) of the IT. Act. We find an identical issue had come up before this Bench of the Tribunal in the case of Sahiwai Investment & Trading co. vs. ITO vide ITA No.4913/Del/2015 for assessment year 2006-07 order dated 18.07.2018 to which both of us parties.

We find the Tribunal in the said decision while allowing the additional ground filed by the assessee has decided the issue in favour of the assessee by observing as under.

“72. Additional Ground No. (ii) is relating to absence of specific charge pointing out in the notice. It is pertinent to note here that the penalty order is based on furnishing of inaccurate particulars but the notice is not specifying exactly on which limb the penalty u/s 271(1)(c) has been initiated. From the notice dated 30.06.2013 produced by the Ld. AR during the hearing, it can be seen that the Assessing Officer was not sure under which limb of provisions of Section 271 of the Income Tax Act, 1961, the assessee is liable for penalty. The issue is squarely covered by the decision of the Hon'ble Supreme Court in case of M/s SSA' Emerald Meadows. The extract of the decision of the Hon'ble Karnataka High Court in M/s. SSA' Emerald Meadows are as under which was confirmed by the Hon'ble Apex Court:

"3. The Tribunal has allowed the appeal filed by the assessee holding the notice issued by the Assessing Officer under Section 274 read with Section 271(1)(c) of the Income Tax Act, 1961 (for short 'the Act') to be bad in law as it did not specify 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 of inaccurate particulars of income. The Tribunal, while allowing the appeal of the assessee, has relied on the ITA No. 4913/Del/2015 decision of the Division Bench of this Court rendered in the case of COMMISSIONER OF INCOME TAX -VS- MANJUNATHA COTTON AND GINNING FACTORY (2013) 359 ITR 565.

4. In our view, 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 in this appeal for determination by this Court. The appeal is accordingly dismissed."

Thus, Additional Ground No. (ii) of the assessee's appeal is allowed. Since the inception of the notice issued u/s 271(1)(c) has become null and void, there is no need to comment on merit of the case. The Penalty u/s 271(1)(c) of the Act is quashed."

16. Since in the instant case also the

inappropriate words in the penalty notice has not been struck off and the notice does not specify as to under which limb of the provisions, the penalty u/s 271(1)(c) has been initiated, therefore, we are of the considered opinion that the penalty levied u/s 271(1)(c) is not sustainable and has to be deleted. Although the Id. DR has relied on various decisions to the proposition that mere non-striking off of the inappropriate words will not invalidate the penalty proceedings, however, all these decisions are of nonjurisdictional High Court decisions. The decision of the Delhi Bench of the Tribunal relied on by the Id. DR is prior to the decision of the Hon'ble Karnataka High Court in the case of SSA'S Emerald Meadows (supra) where the SLP filed by the Revenue has been dismissed. Since there is no decision of the Jurisdictional High Court on this issue, therefore, we find merit in the argument of the Id. counsel for the assessee that if two views are available on a particular issue, the view which is favourable to the assessee has to be followed in the light of the decision of the Hon'ble Supreme Court in the case of Vegetable Products Limited (supra). We, therefore, set-aside the order of the Id. CIT(A) and direct the Assessing Officer to cancel the penalty so levied.

17. *In the result, the appeal filed by the assessee is allowed.*

11. Similar view has been taken by the coordinate benches of the Tribunal in various other decisions relied on by the Ld. Counsel for the assessee. Since the inappropriate words in the penalty notice has not been struck off and the notice does not specify as to under which limb of the provisions, the penalty u/s 271 (1) (c) have been initiated, therefore, I am of the considered opinion that the penalty levied u/s 271 (1) (c) is not sustainable and has to be deleted.

12. I, therefore, set aside the order of the CIT(A) and direct the Assessing Officer to cancel the penalty. The grounds raised by the assessee are accordingly allowed.

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13. After hearing both the sides I find in the instant case the AO has levied penalty of Rs.3,76,690/- u/s 271 (1) (c) of the IT Act which is upheld by the CIT(A). I find the grounds raised in the impugned appeal are identical to the grounds raised in ITA No.5655/Del/2018. I have already decided the issue and cancelled the penalty on account of non striking off of the inappropriate words in the notice. Since in the instant case also the AO has not struck off the inappropriate words in the notice u/s 274 r.w.s. 271 (1) (c) of the IT Act, therefore, following the reasons given therein the penalty is not sustainable in the instant case also. I, therefore, set aside the order of the CIT(A) and direct the AO to cancel the penalty so levied u/s 271 (1) (c) of the IT Act. The grounds raised by the assessee are accordingly allowed.

14. In the result, both the appeals filed by the respective assesseees are allowed.

Order pronounced in the open court on 28.03.2019.

Sd/-
(R.K PANDA)
ACCOUNTANT MEMBER

Neha

Date:- 18.03.2019

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	18.03.2019
Date on which the typed draft is placed before the dictating Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for Pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	