

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'G' NEW DELHI**

**BEFORE SHRI G. D. AGRAWAL, VICE PRESIDENT
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

I.T.A. No. 3108/DEL/2015 (A.Y 2011-12)

TA Steels Pvt. Ltd. F-1, Jangpura Extension New Delhi AACCT3107E (APPELLANT)	Vs	ITO Ward 16(1) New Delhi (RESPONDENT)
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Appellant by	Sh. Prabhat Kumar, CA
Respondent by	Sh. N. K. Bansal, Sr. DR

Date of Hearing	03.04.2019
Date of Pronouncement	06.05.2019

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed by the assessee against the order dated 30/03/2015 passed by CIT(A)-IX, New Delhi for Assessment Year 2011-12.

2. The grounds of appeal are as under:-

1. *"The order passed by the Ld. AO levying penalty u/s 274 r.w.s. 271(1)0 of the Income Tax Act, 1961 is illegal and bad in law.*
2. *On the facts and circumstances of the case, the Ld AO has failed to distinguish whether the penalty levied is for (a) concealment of income, or (b) furnishing inaccurate particulars of the income by the assessee company.*
3. *The order of penalty passed by Ld. AO and confirmed by Ld. CIT(A) is bad in law in as much -*
 - a. *the basis of penalty is addition made on estimates in quantum proceedings;*
 - b. *making of bona-fide claim for deduction is not at par with concealment or giving inaccurate particulars;*

- c. *full disclosure of all facts was made and the same was in consonance with the stand of the Assessing officer;*
 - d. *The profit accruing to the assessee company has been offered to tax in the subsequent assessment year;*
 - e. *The assumption of fact that assessee company had followed project completion method instead of percentage completion method as stipulated in AS -7 is wholly incorrect and is in contradiction to the facts available on record;*
 - f. *The quantum addition does not have any effect on present or future tax liability of assessee company as the reduced returned loss was not allowed to be carried forward on account of late filing of the return of income;*
 - g. *The penalty order is a non-speaking order; and*
 - h. *Non filing of appeal against quantum addition does not call for automatic levy of penalty.*
4. *On the facts and circumstances of the case, Ld. CIT(A) has erred, while upholding AO's penalty order, in*
- a. *making observation that "t/ze appellant has failed to furnish any evidence in support of its claim that only 18% of the project had been completed in the assessment year under consideration" whereas there is no such allegation in either assessment order or in penalty order passed by Ld. AO;*
 - b. *Alleging that "The appellant has failed to show that the income computed by AO from the project, in quantum proceedings, is not correct," whereas the appellant has clearly demonstrated that Ld. AO was guided by incorrect appreciation of facts;*
 - c. *Holding that "In the penalty proceedings, it was for the appellant to substantiate its claim that no penalty is leviable and establish that it has made full and true disclosure of all the facts in its return of income"" and*
 - d. *Rejecting the appeal after concluding that "The facts discussed in the penalty order show that this is not a case where the explanation was bona-fide and there was full disclosure of facts", whereas Ld. AO has not alleged either in assessment order or penalty order that the appellant has failed to do so."*

3. The assessee Company filed return of income for Assessment Year 2011-12 declaring loss of Rs. 9,52,563/-. Since, it was belated return filed, the return loss was not claim for carry forward to subsequent years. The return was subjected to proceedings u/s 143(2) of the Act. The Assessing Officer made addition in respect of Section 14A read with Rule 8D, estimation of profit from the advance received from Ansal Properties thereby reducing return loss of Rs. 7,50,000/-. The assessee had not challenged the order of the assessment in the appeal as the return income was officially assessed at loss and the same was not in time for carry forward in view of the return of income beyond the prescribed date u/s 139 (1) of the Act. The Assessing Officer recorded his satisfaction in relation to estimation of profits from the advance received from Ansal Properties and initiated penalty proceedings under Section 274 read with Section 271(1)(c) of the Act. The Assessing Officer passed penalty order by imposing penalty of Rs. 2,31,750/-.

4. Being aggrieved by the penalty order, the assessee filed appeal before the CIT(A). The CIT(A) dismissed the appeal of the assessee.

5. The Ld. AR submitted that the notice itself is not just and proper as which limb has been invoked by the Assessing Officer was neither struck off nor specifically mentioned in the notice dated 25/3/2014 issued u/s 274 read with Section 271 of the Act. Besides that the Ld. AR also submitted that the quantum addition specifically do not have any effect in present or future tax liability of the assessee company as the loss was on account of late filing of the returns. Thus, the Ld. AR submitted that the notice itself is bad in law as per the various decisions of the Tribunal as well as the Hon'ble High Court and Hon'ble Apex Court.

6. The Ld. DR relied upon the penalty order and order of the CIT(A).

7. We have heard both the parties and perused the material available on

record. From the notice dated 25/3/2014 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 Meadow. 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."

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 Ld. 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 non-jurisdictional High Court decisions. The decision of

the Delhi Bench of the Tribunal relied on by the Ld. 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 Ld. AR 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 CIT(A) and direct the Assessing Officer to cancel the penalty so levied.

9. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the Open Court on 06th May, 2019.

Sd/-

**(G. D. AGRAWAL)
VICE PRESIDENT**

Sd/-

**(SUCHITRA KAMBLE)
JUDICIAL MEMBER**

Dated: 06/05/2019
*R. Naheed **

Copy forwarded to:

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

ASSISTANT REGISTRAR

ITAT NEW DELHI

Date of dictation	03.04.2019
Date on which the typed draft is placed before the dictating Member	04.04.2019
Date on which the typed draft is placed before the Other 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	06.05.2019
Date on which the final order is uploaded on the website of ITAT	06.05.2019
Date on which the file goes to the Bench Clerk	06.05.2019
Date on which the file goes to the Head Clerk	