

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर  
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES "A", JAIPUR

श्री रमेश सी शर्मा, लेखा सदस्य एवं श्री विजय पाल राव, न्यायिक सदस्य के समक्ष  
BEFORE: SHRI RAMESH C SHARMA, AM & SHRI VIJAY PAL RAO, JM

आयकर अपील सं./ITA No. 676/JP/2017  
निर्धारण वर्ष / Assessment Year :2008-09

Late Smt. Jamuna Devi, Through L/H- Naresh Kumar, M/s Narang Stone, Bharatpur Road, Murrki, Tehsil Bayana, Bharatpur.	बनाम Vs.	A.C.I.T., Circle- Bharatpur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AFQPD 3798 H		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Manish Agarwal (CA)  
राजस्व की ओर से / Revenue by : Shri Ashok Khanna (JCIT)

सुनवाई की तारीख / Date of Hearing : 26/03/2019  
उदघोषणा की तारीख / Date of Pronouncement : 20/06/2019

आदेश / ORDER

PER: R.C. SHARMA, A.M.

This is an appeal filed by the assessee against the order of Id.CIT(A), Alwar dated 01/06/2017 for the A.Y. 2008-09 in the matter of imposition of penalty U/s 271(1)(c) of the Income Tax Act, 1961 (in short, the Act).

Following grounds have been taken by the assessee:

- "1 On the facts and in the circumstances of the case and in law, Ld. CIT(A) erred in confirming penalty of Rs. 1,28,128/- levied by Ld. AO U/s 271(1)(c) of the Income Tax Act, 1961, by ignoring the fact that penalty proceedings were initiated for furnishing inaccurate particulars of income whereas penalty was levied for concealment

*of income as well as for furnishing inaccurate particulars of income, which is not in accordance with law. It is therefore prayed that penalty levied u/s 271(1)(c) is not accordance with law and deserves to be deleted.*

2. *On the facts and in the circumstances of the case the Ld. CIT(A) has grossly erred in confirming penalty of Rs. 1,28,128/- levied u/s 271(1)(c) of the Income Tax Act, 1961 on the additions of Rs.4,14,652/- made by Ld. AO, alleging the same as unaccounted sales arbitrarily solely relying upon conclusions drawn in assessment proceedings though penalty proceedings are separate and distinct proceedings, thus the penalty so confirmed deserves to be deleted.*
3. *The appellant craves the right to add, delete or amend any of the grounds of appeal either before or at the time of hearing of appeal.”*

2. Rival contentions have been heard and record perused. The facts in brief are that the assessee is engaged in the business of manufacturing and trading of pillars & slabs of sand stones. In this case, survey U/s 133A of the Act was carried out on 18/03/2008 at the business premises of the assessee. During the course of survey proceedings, certain incriminating documents/loose papers diary/bills etc. were found and impounded. After considering the assessee's reply and after perusing the impounded material as well as books of account and other relevant materials, the A.O. found that the assessee has made unaccounted sales of Rs. 13,37,586/- (21,16,592-7,79,306), this sale pertains to the assessment year under consideration. The A.O. further observed that no supporting evidences in

this regard were also furnished by the assessee. Considering the facts and circumstances of the case and to meet end of natural justice, the A.O. made addition with respect to profit earned on such unaccounted sales. The A.O. also levied penalty U/s 271(1)(c) of the Act in so far as the addition has been confirmed by the Id. CIT(A) as well as the Tribunal. By the impugned order, the Id. CIT(A) has confirmed the action of the A.O. for levy of penalty, against which the assessee is in further appeal before us.

3. It was argued by the Id. AR of the assessee that the penalty proceedings in the case of assessee were specifically initiated for furnishing inaccurate particulars of income as has been evident from the perusal of the assessment order at page 10 para 1. However, while imposing the penalty, Id. AO has recorded the conclusion that assessee has concealed the income in addition to furnishing of inaccurate particulars of income.

4. The Id AR has submitted that while initiating penalty u/s 271(1)(c) of the Act the AO has recorded satisfaction and directed initiation of penalty for 'furnishing of inaccurate particulars of income', which is evident from the assessment order, whereas in the penalty order the same has been levied alleging 'concealment of income and also furnishing of inaccurate particulars of income. According to provisions

of sec. 271 (1)(c), the AO has to show that the assessee has either concealed his income or has furnished inaccurate particulars of income. Concealment of income is quite different from furnishing inaccurate particulars of income and the satisfaction recorded during assessment proceedings regarding the kind of charge i.e. whether penalty proposed is for furnishing inaccurate particulars or for concealment of income has to be confirmed in the penalty order. Thus, if penalty is proposed for one charge the assessee cannot be found guilty of another while imposing penalty.

5. Reliance was placed on the decision of the Hon'ble ITAT Amritsar bench, in the case of HPCL Mittal Energy Ltd. Vs. ACIT in ITA No. 554 & 555/ Asr/2014 dated 03.05.2018. wherein it has been held that where satisfaction of the AO while initiating penalty proceedings u/s 271(1)(c) of the I T Act is with regard to alleged 'concealment of income' by the assessee, whereas imposition of penalty is for 'Concealment/ furnishing inaccurate particulars of income', the levy of penalty is not sustainable.

6. The Id. AR has further argued that the estimated addition has been made for which no penalty is leviable. He further contended that the papers found during the course of survey contained rough

calculation/estimation of measurement, or belonged to some other parties and did not reflect any unaccounted sales of the assessee. Thus, the penalty levied with reference to the profit computed at 31% on unaccounted sales is purely on estimation basis for which no penalty is leviable.

7. On the other hand, the Id DR has relied on the orders of the authorities below and contended that unaccounted sales so found during the course of survey in terms of incriminating material was confirmed by both i.e. by the Id. CIT(A) and the Hon'ble Tribunal, therefore, there is no infirmity in the order of the A.O. in levying the penalty U/s 271(1)(c) of the Act with regard to addition so made.

8. The Id. DR has also contended that the A.O. has correctly levied penalty with reference to the income concealed and inaccurate particulars furnished by the assessee, accordingly, the penalty so levied cannot be cancelled on technical ground. With regard to merit of the penalty so imposed, he contended that the penalty was not imposed with reference to any estimation of income but was on the basis of concrete material and incriminating documents found during the course of survey which lead to the precise amount of unaccounted sales made by the assessee out of books of account and on which the

A.O. has computed profit which has escaped assessment by failure of assessee to file inaccurate particulars of income.

9. We have considered the rival contentions and carefully gone through the orders of the authorities below. We had considered the written submissions dated 26/03/2019 filed by the assessee wherein various judicial pronouncements were relied upon. We had deliberated upon all these judicial pronouncements with reference to the factual matrix of the case. With regard to illegality of the penalty imposed with reference to the observation made in assessment order vis a vis in the penalty order, the Id AR has relied on the decision of Amritsar Bench of the ITAT in the case of HPCL Mittal Energy Ltd. Vs ACIT (supra). As per the Id AR while initiating the penalty proceedings with regard to alleged "concealment of income" and imposing penalty for the other charge i.e. furnishing of inaccurate particulars/concealment, the levy of penalty is not sustainable.

10. We had carefully gone through the order of the Amritsar Bench of the ITAT in the case of HPCL Mittal Energy Ltd. Vs ACIT (supra) wherein the Tribunal have observed that after insertion of sub-section (1B) to Sec. 271 w.e.f. 01/4/1989, the A.O. need not specifically record in the quantum order as to whether each item of

addition/disallowance is a case of concealment of particulars of income or furnishing of inaccurate particulars of income. The Tribunal have further observed that deeming 'satisfaction' under clause (c) in terms of sub-section (1B) means deeming 'proper satisfaction' and 'proper satisfaction means getting satisfied as to whether it is a case of concealment of particulars of income or furnishing of inaccurate particulars of such income.

11. With regard to levy of charge at the stage of initiation of penalty by issue of notice U/s 274 r.w.s. 271(1)(c) vis a vis charge levied in the penalty order U/s 271(1)(c) of the Act, the precise observation of the Tribunal was as per para 15 which reads as under:

*"15. The moot question is that what should be the nature of specification of a charge by the AO at the stage of initiation of penalty proceedings and at the time of passing the penalty order. Is the AO required to specify in the penalty notice/order as to whether it is a case of 'concealment of particulars of income'; or 'furnishing of inaccurate particulars of income'; or both of them, which can be expressed by using the word 'and' between the two expressions. When the AO is satisfied that it is a clear-cut case of concealment of particulars of income, he must specify it so in the notice at the time of initiation of penalty proceedings and also in the penalty order. The AO cannot initiate penalty on the charge of 'concealment of particulars of income', but ultimately find the assessee guilty in the penalty order of 'furnishing inaccurate particulars of income'. In the*

*same manner, he cannot be uncertain in the penalty order as to concealment or furnishing of inaccurate particulars of income by using slash between the two expressions. When the AO is satisfied that it is a clear-cut case of 'furnishing of inaccurate particulars of income', he must again specify it so in the notice at the time of initiation of penalty proceedings and also in the penalty order. After initiating penalty on the charge of 'furnishing of inaccurate particulars of income', he cannot impose penalty by finding the assessee guilty of concealment of particulars of income'. Again, he cannot be uncertain in the penalty order as to concealment or furnishing of inaccurate particulars of income by using slash between the two expressions. When the AO is satisfied that it is a clear-cut case of imposition of penalty u/s 271(1)(c) of the Act on two or more additions/disallowances, one or more falling under the expression 'concealment of particulars of income' and the other under the 'furnishing of inaccurate particulars of income', he must specify it so by using the word 'and' between the two expressions in the notice at the time of initiation of penalty proceedings. If he remains convinced in the penalty proceedings that the penalty was rightly initiated on such counts and imposes penalty accordingly, he must specifically find the assessee guilty of 'concealment of particulars of income' and also 'furnishing of inaccurate particulars of income' in the penalty order. If the charge is not levied in the above manner in all the three clear-cut situations discussed above in the penalty notice and also in the penalty order, the penalty order becomes unsustainable in law."*

12. The sum and substance of above decision is that the nature of specification of charge by the A.O. at the stage of issue of notice U/s

274 read with Section 271(1)(c) of the Act and at the time of passing the penalty order U/s 271(1)(c) should not be at variance. If there is any variance between the charge levied at the time of issuance of notice for levying the penalty and the charge levied at the time of imposition of penalty, the penalty order will be vitiated and penalty cannot be sustained. However, if the charge are same both in the notice issued for levy of penalty and the order passed U/s 271(1)(c) of the Act then no fault can be found with regard to defect in notice so as to hold that the penalty is not leviable.

13. Now we consider the facts of the instant case with reference to the judicial pronouncements discussed hereinabove, we found that for initiating the penalty the A.O. has issued notice U/s 274 r.w.s. 271(1)(c) of the Act on 20/12/2010 for "concealment and furnishing of inaccurate particulars of his income". This fact has been mentioned by the A.O. at page 1 of penalty order dated 18/3/2015 and the same was not disputed by the Id AR by bringing any positive material on record. Thereafter considering the assessee's contention, the A.O. has passed penalty order U/s 271(1)(c) on 18/03/2015 wherein the penalty was levied after having the following observation:

*"In view of the above discussion, the assessee has concealed his income and also furnished inaccurate particulars of his income.*

*Thus, it is a fit case for imposing penalty U/s 271(1)(c) of the I.T. Act. Therefore, I hereby confirm penalty U/s 271(1)(c) of Rs. 1,28,128/- @ 100% of tax sought to be evaded."*

14. It is clear from the above that both at the time of initiation of penalty by issuance of notice as well as at the time of imposing the penalty U/s 271(1)(c), the charge of the A.O. was same i.e. "concealment of income and also for furnishing inaccurate particulars of income". Thus, there is no variation in the charge for levy of penalty and show cause notice issued for levy of penalty. Accordingly, the proposition laid down by the Coordinate Bench in the case of HPCL Mittal Energy Ltd. Vs ACIT (supra) will not help the assessee so as to persuade us to cancel the penalty so imposed. Accordingly, we hold that the penalty has been correctly levied in so far as the charge for initiation of penalty as well as charge while levying the penalty was same. Thus, we do not find any merit in the contention of the Id AR.

15. With regard to merit of penalty so imposed U/s 271(1)(c) of the Act, we found that there was survey at the business premises of the assessee wherein on the basis of incriminating documents so found, unaccounted sales of Rs. 13,37,586/- was worked out. Very reasonably the A.O. made addition with regard to profit earned on such unaccounted sales which has been confirmed by the Id. CIT(A) and the

Tribunal. Thus, there is no dispute with regard to the concealment of income and furnishing of inaccurate particulars of income, in so far as the addition has been upheld up to the last extent. It has not been shown by the Id AR as to whether the order of the Tribunal in quantum appeal was challenged before the Hon'ble High Court and the Hon'ble High Court has accepted substantial questions of law so as to suggest that it is debatable issue.

16. We also observe that the penalty has been levied with reference to the incriminating material found during the course of survey which indicated exact amount of unaccounted sales. These unaccounted sales have been confirmed both by the Id. CIT(A) and the Tribunal. The A.O. has levied penalty only with respect to profit earned on these unaccounted sales which has not been disclosed in the return of income. Accordingly, it cannot be said that the penalty was levied with reference to estimation of income. Accordingly, we do not find any infirmity in the penalty so imposed.

17. Considering the totality of facts and circumstances of the case and the judicial pronouncements, we are inclined to agree with the Id DR Shri Ashok Khanna that the A.O. was justified in imposing penalty of Rs. 1,28,128/- U/s 271(1)(c) of the Act.

18. In the result, appeal of the assessee is dismissed.

Order pronounced in the open court on 20<sup>th</sup> June, 2019.

Sd/-  
(विजय पाल राव)  
(VIJAY PAL RAO)  
न्यायिक सदस्य / Judicial Member

Sd/-  
(रमेश सी शर्मा)  
(RAMESH C SHARMA)  
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 20<sup>th</sup> June, 2019

\*Ranjan

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

1. अपीलार्थी / The Appellant- Late Smt. Jamuna Devi, Through L/H- Naresh Kumar, Bharatpur.
2. प्रत्यर्थी / The Respondent- The A.C.I.T., Circle- Bharatpur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 676/JP/2017)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar