



**IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK 'SMC' BENCH, CUTTACK**

BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER

ITA No.190/CTK/2018
Assessment Year: 2011-12

Sujit Kumar Behera, Plot No.A/356, Saheed nagar, Bhubaneswar.	Vs.	ITO, Ward 2(2), Bhubaneswar.
PAN/GIR No.		
(Appellant)	..	(Respondent)

Assessee by : Shri C.Parida, AR
Revenue by : Shri Subhendu Dutta, DR

Date of Hearing : 23/07/ 2019
Date of Pronouncement : 23/07/ 2019

ORDER

This is an appeal filed by the assessee against the order of the Commissioner of Income Tax(Appeals)-2, Bhubaneswar dated 4.5.2018 for the assessment year 2011-12 confirming the penalty of Rs.3,92,709/- under section 271(1)(c) of the Act.

2. The assessee is an individual, filed his return of income for the assessment year 2011-12 on 30.9.2011 showing total income of Rs.4,19,430/-. The Assessing Officer completed the assessment u/s.143(3) of the Act determining total income at Rs.37,28,572/-. The CIT(A) in the quantum proceedings allowed relief to the tune of Rs.8,95,747/- out of undisclosed cash of Rs.33,02,620/- and confirmed an amount of

Rs.24,06,873/- and also interest income of Rs.6522/-.. Thereafter, on appeal before the Tribunal, relief for an amount of Rs.11,45,051/- was allowed and balance amount of Rs.12,61,822/- was confirmed. Subsequently, the Assessing Officer asked the assessee as to why an order imposing penalty u/s.271(1)(c) of the Act should not be made. In reply, the assessee submitted that it is a matter of cash deposit which received as advance from the customer to sale ancestral property and the same was returned during the financial year 2011-12 due to dispute to sale that property. The AO did not accept the contention of the assessee and initiated penalty proceedings u/s.271(1)(c) of the Act on the ground that the assessee has concealed the particulars of his income and also furnished inaccurate particulars of income and finally imposed penalty of Rs.3,92,709/- being 100% of tax sought to be evaded. The Assessing Officer also relied on the decision of Hon'ble Supreme Court in the case of Union of Indiq vs Dhamendra Textile Processors(2008) 134 SCC 369) to submit that the Assessing Officer is not required to record his satisfaction in a particular manner or reduce it into writing and the scope of section 271(1)(c) has been elaborately discussed in the said decision of Hon'ble Supreme Court.

4. On appeal, the CIT(A) confirmed the levy of penalty and hence, the assessee is in appeal before the Tribunal.

5. I have heard the rival submissions, and perused the record of the case. Undisputedly, penalty of Rs.3,92,709/- has been levied u/s 271(1)(c) of the Act primarily on the ground of cash deposit of Rs.33,02,620/- deposited in the bank by the assessee. It is also not in dispute that the addition of Rs.11,45,051/- has been confirmed by the Tribunal in quantum appeal. It is also not in dispute that the penalty has been imposed for intentionally furnishing "inaccurate particulars of income". In the backdrop of the aforesaid facts and circumstances of the case, order passed by the lower Revenue authorities and arguments addressed by the rival parties, the sole question arises for determination in this case is "as to whether the assessee has concealed particulars of income or has furnished inaccurate particulars of income during assessment proceedings while interpreting the provisions contained u/s 271(1)(c) of the Act?".

6. The Id. AR for the assessee furnished a show-cause notice issued by the AO u/s 274, placed in the file and submitted that notice is not a valid notice to initiate the penalty proceedings as the assessee has not been made aware if it has concealed the particulars of income or has furnished inaccurate particulars of such income and for this proposition relied upon the decision rendered by the Hon'ble Karnataka High Court in case of CIT vs. Manjunatha Cotton and Ginning Factory & Ors. 359 ITR 565 (Karn.).

7. Replying to above, Id D.R. submitted that the notice issued by the AO u/s 274 of the Act is not standalone document which is based on

assessment order and that the notice has been issued in respect of furnishing inaccurate particulars of income.

9. To proceed further, I would like to reproduce notice issued u/s 271(1)(c) of the Act for ready perusal :-

“NOTICE UNDER SECTION 274 READ WITH SECTION 271 OF THE INCOME TAX ACT, 1961 Dated : 29.3.2014

To
Sujit Kumar Behera,
Plot Not. A/356, Sahied Nagar,
Bhubaneswar.

Whereas in the course of proceedings before me for the assessment year 2011-12 it appears to me that you:-

.....
.....

have without reasonable cause failed to comply with a notice..... under section 142(1)/14392) of the income tax Act, 1961.

.....

You are hereby requested to appear before me on dtd.20.5.2014 at 12.30 PM and show cause why an order imposing a penalty on you should not be made under section 271 of the Income Tax Act, 1961. If you do not wish to avail yourself of this opportunity of being heard in person or through authorized representative you may show cause in writing on or before the said date which will be considered before any such order is made under section 271.

Sd/-(L.R.Muduli)ITO, Ward 2(2),
Bhubaneswar.

9. Undisputedly, addition made against the assessee during quantum proceedings have been confirmed partly. It is settled principle of law that the penalty cannot be imposed merely on the ground that addition made in the income of the assessee has been confirmed rather to proceed with

imposition of penalty u/s 271(1)(c), the AO has to prove that there was concealment of particulars of income or assessee has furnished inaccurate particulars of such income.

10. Bare perusal of the notice issued to the assessee u/s 271(1)(c) of the Act reproduced above goes to prove that assessee has not been called upon to explain if he has concealed the particulars of income or furnished inaccurate particulars of such income rather same has been strike out in the printed proforma. The Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory, 359 ITR 565 (Kar) observed that the levy of penalty has to be clear as to the limb under which it is being levied. As per Hon'ble High Court, where the Assessing Officer proposed to invoke first limb being concealment, then the notice has to be appropriately marked. The Hon'ble High Court held that the standard proforma of notice under section 274 of the Act without striking of the irrelevant clauses would lead to an inference of non-application of mind by the Assessing Officer. The Hon'ble Supreme Court in the case of Dilip N. Shroff vs. JCIT, 291 ITR 519(SC) has also observed that where the Assessing Officer issues notice under section 274 of the Act in the standard proforma and the inappropriate words are not deleted, the same would postulate that the Assessing Officer was not sure as to whether he was to proceed on the basis that the assessee had concealed the particulars of his income or furnished inaccurate particulars of income. According to the Hon'ble Supreme Court,

in such a situation, levy of penalty suffers from non-application of mind. The Hon'ble Supreme Court in the case of CIT vs. SSA's. Emerald Meadows dated 11th January, 2017 passed in Special Leave to Appeal (CC No.11485/2016) has held that Omission by the AO to explicitly specify in the penalty notice as to whether penalty proceedings are being initiated for furnishing of inaccurate particulars or for concealment of income makes the penalty order liable for cancellation. As regards to the decision relied upon by the Assessing Officer, I am of the considered opinion that the views expressed by Their Lordships in Dharmendra Textiles Processor's case (supra) do not bring about any radical change in the scheme of section 271(1)(c) though these views do seek to nullify the Dilip N Shroff's judgment (supra) which, in the esteemed views of the larger Bench, did not take into account the correct scheme of things as these were more particularly post-insertion of Explanation 1 to section 271(1)(c). Indeed, even on the first principle and as seen in the above light, while this view is in accordance with the scheme of the section and the amendment brought about in the scheme of the section by insertion of explanation 1 to Section 271(1)(c), it does not bring about any radical change to the main scheme of section 271(1)(c) itself. In the background of the aforesaid legal position and, having regard to the manner in which the Assessing Officer has issued notice under section 274 r.w.s. 271(l)(c) of the Act dated 29.3.2014 for assessment year 2011-12 without mentioning that whether the assessee

had concealed the particulars of his income or furnished inaccurate particulars of income, I am of the considered view that when the assessee has not been specifically made aware of the charges leveled against him as to whether there is a concealment of income or furnishing of inaccurate particulars of income on his part, the penalty u/s 271(1)(c) of the Act is not sustainable. In view of above, I hold that the proceedings show a non-application of mind by the Assessing Officer and is, thus, unsustainable. Therefore, I delete the penalty of Rs.3,92,709/- imposed u/s.271(1)(c) of the Act.

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

Pronounced on 23/7/2019

Sd/-

(Chandra Mohan Garg)
JUDICIALMEMBER

Cuttack; Dated 23/07/2019
B.K.Parida, SPS

Copy of the Order forwarded to :

1. The Appellant : Sujit Kumar Behera, Plot No.A/356, Saheed nagar, Bhubaneswar
2. The Respondent. ITO, Ward 2(2), Bhubaneswar.,
3. The CIT(A)-2, Bhubaneswar
4. Pr.CIT- 2, Bhubaneswar
5. DR, ITAT, Cuttack
6. Guard file.
//True Copy//

By order

Sr. Pvt. Secretary,
ITAT, Cuttack