IN THE INCOME TAX APPELLATE TRIBUNAL

"C" BENCH : BANGALORE

BEFORE SHRI ARUN KUMAR GARODIA, ACCOUNTANT MEMBER AND

SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 2343/Bang/2018
Assessment Year : 2009-10

Shri Babu Reddy Appaiah, No. 25, Vinayaka Nilaya, Sy no. 179/2, J P Nagar, 8th Phase, Bangalore – 560 062. **PAN: ABEPA7257L**	Vs.	The Assistant Commissioner of Income Tax, Circle – 3 (2) (1), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri Ravishankar S.V., Advocate
Revenue by	:	Shri M. Rajasekhar, Addl. CIT (DR)

Date of hearing	:	15.07.2019
Date of Pronouncement	:	02.08.2019

O R D E R

Per Shri A.K. Garodia, Accountant Member

This appeal is filed by the assessee and the same is directed against the order of ld. CIT(A)-3, Bangalore dated 08.06.2018 for Assessment Year 2009-10.

2. The grounds raised by the assessee are as under.

"*1. The order passed by the learned assessing officer, under section 271(1)(c) of the Act, is opposed to law, weight of evidence. natural justice probabilities, facts and circumstances of the Appellant's case.*

2. The Appellant denies himself liable to the penalty of Rs. 4,14,053/- levied by the learned assessing officer under section 271(1)(c) of the Act or penalty as reduced by the CIT(A) under the facts and circumstances of case.

3. The notice issued under section 271(1)(c) of the Act, is bad in law, on the facts and circumstances of the case.

4. The learned CIT(A) was not justified in appreciating that the AO has not assumed proper jurisdiction, as the mandatory conditions for invoking the provisions of section 271(1)(c) of the Act has not been complied with under the facts and circumstances of the case.

5. The CIT(A) was not justified in law, in appreciating that the AO has not recorded satisfaction in the order of assessment, either for

concealment or furnishing inaccurate particulars of income, on the facts and circumstances of the case.

6. The learned CIT(A) was not justified in appreciating that the let out buildings were earning rental income and the rental incomes have been offered to tax and hence on the preponderance of possibilities, the estimated investment made in building ought to have been accepted in computing the capital gains, on the facts and circumstances of the case.

7. The learned CIT(A) was not justified in not appreciating that the value of the buildings ought to have been estimated suo mote by the AO or the CIT(A) ought to have directed for the same and the capital gains ought to have been reduced to the extent, on the facts and circumstances of the case.

8. The learned CIT(A) was not justified in observing that the appellant has not furnished any documents to demonstrate that the compensation to tenants was paid, when the AO has stated in the order of assessment that the acknowledgements were filed on the facts and circumstances of the case.

9. The learned CIT(A) was not justified in observing that the appellant has not furnished any details for paying compensation, during appellate proceedings when the CIT(A) has perused and verified the documents during the hearing, on the facts and circumstances of the case.

10. The learned CIT(A) was not justified in confirming the penalty order on findings which are erroneous. on the facts and circumstance of the case.

11. The learned CIT(A) was not justified in law and on facts, that the levy of penalty under section 271(1)(c) of the Act is not automatic and the learned assessing officer ought to have (trooped the penalty proceedings under the facts and circumstances of the case.

12. The learned CIT(A) was not justified in not appreciating that the penalty proceedings are independent with that of the assessment proceedings and ought to have considered the submissions made by the appellant as regard to the merits of the matter under the facts and circumstances of the case.

13. The authorities below failed to appreciate that the appellant has neither concealed any income nor furnished inaccurate particulars of income to warrant levy of penalty and therefore the penalty levied under section 271(1)(c) of the Act requires to be cancelled.

14. The authorities below failed to appreciate the fact that mere additions and disallowances made in the assessment proceedings does not automatically warrant the levy of penalty under section 271(1)(c) of the Act, under the facts and circumstances of the case.

15. Without prejudice to the above, the penalty levied is highly excessive and liable to reduced substantially.

16. The appellant craves leave of this Hon'ble Tribunal, to add, alter, delete. amend or substitute any or all of the above grounds of appeal as may be necessary at the time of hearing.

17. For these and other grounds that may be urged at the time of hearing of appeal, the appellant prays that the appeal may be allowed for the advancement of substantial cause of justice and equity."

3. Brief facts are that it is noted by the AO in para 7 of the assessment order that while computing capital gains, the assessee has claimed cost of construction of sheds of Rs. 6,35,000/- (1985-86) and Rs. 8,95,000/- (1989-90) and compensation paid for vacating sheds of Rs. 11,50,000/-. It is further noted by the AO in same para of assessment order that assessee was requested to provide documents in support of his claim and in response, the assessee has submitted the lease rental agreements entered into by the assessee with various parties for leasing out the land in question along with the sheds therein for factory/godown purpose. It is also noted by the AO that the assessee has claimed that in the said rental agreement, the description of sheds is mentioned which goes on to show that sheds were constructed and in the same agreements, compensation paid to the tenants was recorded in ink along with signatures. The AO observed in the same para that although the presence of the sheds is established through the rental agreements, the assessee could not establish any proof with regard to the amount of the expenditure involved and also that the sheds were constructed in multiple phases. The AO held that only Rs. 6.35 Lakhs before indexation is allowed and the remaining amount 8,95,000/- (1989-90) is disallowed. Regarding the compensation paid to the tenants also, it was held by the AO that the assessee could not establish the genuinity of the compensation paid to the tenants and therefore, disallowed the same also. In this manner, the AO increased the amount of long term capital gain by disallowing these two items of expenses of Rs. 8.95 Lakhs towards cost of construction (1989-90) and Rs. 11.50 Lakhs towards compensation paid to tenants for vacating the sheds. In quantum proceedings, the assessee did not file any appeal before ld. CIT(A) as noted in para 5 of the statement of facts filed before ld. CIT(A) available on page no. 20 of the appeal memo. In the same, it

is stated by the assessee that the details pertaining to investments made over two decades ago could not be filed at short notice. It is further stated in the statement of facts in clause iv of para 8 that the assessee could not file proof of having invested in the industrial building. Further in clause vii of para 8 of statement of facts, it is also submitted by assessee that the assessee has produced the rental agreements for the various sheds which depicted the presence of buildings, which also stated the various payments totaling Rs. 11 Lakhs duly affirmed by the lessors as compensation for vacating the building. Further it is stated in clause ix of para 8 of statement of facts that the AO has further erred in not giving indexation in respect of the amount of Rs. 6.35 Lakhs which was accepted by the AO. It was submitted that under these facts, the penalty imposed by the AO is not justified and the same should be deleted.

4. The ld. AR of assessee placed reliance on the judgment of Hon'ble Karnataka High Court rendered in the case of CIT Vs. Vasanth K Handigund as reported in 327 ITR 233 (Karn). The ld. DR of revenue supported the orders of authorities below.

5. We have considered the rival submissions. First of all, we reproduce para 7 of the assessment order for ready reference.

> "*7. While computing the capital gains, the assesse has claimed cost of construction of sheds of Rs.6,35,000/- (1985-86) and Rs.8,95,000/- (1989-90) and compensation paid for vacating sheds of Rs.11,50,000/. The assesse was requested to provide documents in support of his claim. In response the assesse has submitted the lease rental agreements entered into by the assesse with various parties for leasing out the land in question (along with the sheds there in) for factory/godown purpose. The assesse claimed that in the said rental agreement, the description of sheds is mentioned which goes on to show that sheds were constructed and in the same agreements compensation paid to the tenants was recorded in ink along with signatures. Even though the presence of the sheds is . established through the rental agreements, the assesse could not establish any proof with regard to the amount of the expenditure involved and also that the sheds were constructed in multiple phases. Hence only Rs.6,35,000/- (before indexation) is allowed and the remaining amount is disallowed. Similarly, the assesse could not establish the genuinity of the compensation paid to the tenants. Hence the same is disallowed. Consequently, the amount of capital gain arising out of the transfer of the capital asset is computed at Rs. 1,92,37,868/- and the Net consideration is computed at Rs. 2,51,84,667/-.*"

6. From the above para of the assessment order, it comes out that the AO has accepted the claim about cost of construction of shed Rs. 6.35 Lacs in F. Y. 1985 – 86 but the remaining two claims of *Rs.8,95,000/- (1989-90)* and compensation paid for vacating sheds of Rs.11,50,000/ was not accepted mainly for this reason that evidence could not be filed by the assessee and this is the explanation of the assessee that since it pertains to about 2 decades old, details and evidences could not be filed. This explanation appears reasonable so far, the penalty aspect is concerned because in penalty, the AO has to conclusively establish that there is either concealment of income or furnishing of inaccurate particulars of income by the assessee or both. In our considered opinion, merely for want of necessary evidence in support of an expenses incurred before about 20 years, it cannot be said that the AO has conclusively established that there is either concealment of income or furnishing of inaccurate particulars of income or both. Hence, in our considered opinion, in view of these facts alone, penalty is not justified. Moreover, even in respect of the expenses accepted by the AO of Rs.6,35,000/- (1985-86), the AO has not allowed the benefit of indexation and if benefit of indexation is allowed, it will amount to Rs. 21,43,722/-because the index for FY 1985 – 86 is 133 and the same for FY 2008 – 09 is 582 as against the addition of Rs. 20.45 Lacs only. Considering all these facts, we delete the penalty.

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

Order pronounced in the open court on the date mentioned on the caption page.

Sd/-	Sd/-
(PAVAN KUMAR GADALE)	(ARUN KUMAR GARODIA)
Judicial Member	Accountant Member

Bangalore,
Dated, the 02nd August, 2019.
/MS/

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore
6. Guard file

By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Bangalore.