

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : SMC : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER

ITA No.5079/Del/2018
Assessment Year: 2014-15

Brij Bhushan Aggarwal,
2A/1501, Post office Road,
Saharanpur (UP).

Vs. ITO,
Ward-3(1),
Saharanpur (UP).

PAN: ABFPA6529A

(Appellant)

(Respondent)

Assessee by	:	Shri Sameer Jain, Advocatee & Shri Suvigya Awasthy, Advocate
Revenue by	:	Shri S.L. Anuragi, Sr.DR
Date of Hearing	:	30.07.2019
Date of Pronouncement	:	14.08.2019

ORDER

This appeal by the assessee is directed against the order dated 28th May, 2018 of the CIT(A), Muzaffarnagar, relating to Assessment Year 2014-15.

2. Levy of penalty of Rs.1,48,130/- by the Assessing Officer u/s 271(1)(c) of the Act which has been upheld by the CIT(A) is the only issue raised by the assessee in the grounds of appeal.

3. Facts of the case, in brief, are that the assessee is an individual and filed his return of income on 13th August, 2014, declaring the total income of Rs.3,00,090/-.

This case of the assessee was selected for scrutiny. During the course of assessment proceedings, the Assessing Officer noted that the assessee has sold 20 bighas of land for a total consideration of Rs.70,54,000/-. While computing the capital gain, the assessee has claimed indexed cost of filling of soil in bhatta land for 20 bighas at Rs.9,78,125/-. Since the assessee could not substantiate the claim by producing documentary evidence, the Assessing Officer rejected the affidavit filed by the assessee and made addition of Rs.9,78,125/- to the total income of the assessee. The Assessing Officer, thereafter, initiated penalty proceedings u/s 271(1)(c) of the IT Act and levied penalty of Rs.1,48,130/- on account of the addition so made by him which was upheld by the CIT(A) as well as the Tribunal.

4. The ld. counsel for the assessee strongly challenged the order of the CIT(A) in confirming the penalty levied by the Assessing Officer and confirmed by the CIT(A). He submitted that the assessee, during the course of assessment proceedings, has filed an affidavit before the Assessing Officer stating that it has incurred the expenditure since the land was low lying as compared to the road level. It was further submitted that the assessee is not maintaining any books of account and since the case is ten years old the assessee is not in a position to substantiate with documentary evidence. Referring to the decision of the Hon'ble Supreme Court in the case of *CIT vs. Reliance Petroproducts Pvt. Ltd. reported in (2010) 11 SCC 762*, he submitted that submitting incorrect claim in law does not tantamount to furnishing inaccurate particulars of

income of assessee or concealment. He accordingly submitted that the penalty levied by the Assessing Officer and upheld by the CIT(A) is no sustainable.

5. The Id. counsel for the assessee drew the attention of the Bench to the notice issued by the Assessing Officer u/s 274 read with section 271(1)(c) of the Act and submitted that the inappropriate words in the said notice are not struck off, therefore it is not clear as to under which limb the Assessing Officer has levied penalty i.e., for concealment of income or for furnishing inaccurate particulars of income. Referring to the decision of Hon'ble Karnataka High Court in the case of *CIT vs. M/s SSA's Emerald Meadows (2016) 73 taxmann.com*, he submitted that the Hon'ble High Court in the said decision has allowed the appeal of the assessee and dismissed the appeal filed by the Revenue holding that notice issued u/s 274 read with section 271(1)(c) was bad in law as it did not specify under which limb of the section 271(1)(c) penalty proceedings had been initiated. He submitted that against the above decision of the Hon'ble High Court the Revenue had preferred appeal before the Hon'ble Supreme Court and the Hon'ble Apex Court had dismissed the SLP filed by the Revenue, vide order dated 5th August, 2016.

6. The Id. DR, on the other hand, strongly relied on the order of the CIT(A). Referring to the decision of the Chennai Bench of the Tribunal in the case of *ITO vs. Shri Rajan Kalimuthu in ITA No.2900/CHNY/2018, order dated 22nd May, 2019*, he submitted that the Tribunal has distinguished the decision in the case of *Manjunatha Cotton & Ginning Factory 359 ITR 565 (Kar.)* and sustained the penalty levied u/s

271(1)(c) of the Act where the inappropriate words have not been struck off in the show cause notice. Relying on various other decisions, the Id. DR submitted that mere non-striking off of the inappropriate words from the notice cannot invalidate the penalty proceedings especially when the assessee itself has participated in the penalty proceedings and proper opportunity of being heard was given to the assessee. So far as the merit of the case is concerned, the Id. DR submitted that the assessee could not substantiate the claim of expenditure relating to filling of land by producing documentary evidence. Thus, the claim was not bona fide and, therefore, the Assessing Officer had rightly levied penalty u/s 271(1)(c) of the Act which has been upheld by the CIT(A).

7. I have considered the rival arguments made and perused the material available on record. I find the very basis of levy of penalty is the addition made by the Assessing Officer amounting to Rs.9,78,125/- on account of unsubstantiated claim of cost of filling of soil. It is an admitted fact that the addition so made by the Assessing Officer was upheld by the CIT(A) and on further appeal by the assessee the Tribunal had also sustained the addition. Now, the question that arises is as to whether the penalty is leviable on account of such unsubstantiated claim. A perusal of the assessment order shows that the assessee had filed an affidavit on 09.11.2015, the contents of which has been reproduced by the Assessing Officer and which reads as under:-

“On 09.11.2015 the assessee filed an affidavit stating that “as regards the land filling of 20 bighas land lying low as compared to road level and invested Rs. Five lacs on contract basis including the cost of soil, loading transportation of soil, unloading and leveling also in the year 2004 and as the deponent said earlier no books of account has been maintained, there is no other evidence with the deponent after ten years for this investment.”

8. From the above, it is clear that the assessee is not maintaining any books of account and is not having any other documentary evidence since the investment was made ten years back. In my opinion, non-substantiation of the claim of cost of filling of soil may be sufficient for making addition, but, the same, in my opinion, does not call for levy of penalty in the instant case. The Hon'ble Supreme Court in the case of *Reliance Petroproducts Pvt. Ltd. (supra)* has held that merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the Revenue by itself would not, in our opinion, attract the penalty u/s 271(1)(c) of the Act. If we accept the contention of the Revenue, then, in case of every return where the claim made is not accepted by the Assessing Officer for any reason, the assessee will invite penalty u/s 271(1)(c). That is clearly not the intent of the legislature. Since the assessee in the instant case has filed an affidavit before the Assessing Officer and the case is very old and the claim of the assessee that the land in question was a low lying land which was filled to bring it to the road level, therefore, in my opinion, it is not a fit case for levy of penalty for disallowance of the claim. Accordingly, the order of the CIT(A) sustaining the penalty is cancelled and the Assessing Officer is directed to delete the penalty.

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

The decision was pronounced in the open court on 14.08.2019.

Sd/-
(R.K. PANDA)
ACCOUNTANT MEMFBER

Dated: 14th August, 2019

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1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi