

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "H", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER
AND
SHRI N.K.PRADHAN, ACCOUNTANT MEMBER
ITA NO.4282/MUM/2015(A.Y. 2008-09)

Shri KalpeshB. Jain;
C/o. M/s. Rajasthan Corpn.,
No.62/63, Vithalwadi, 2nd Floor,
Kalbadevi Road, Mumbai400002,
PAN:AFHPJ 5722Q

..... Appellant

Vs.

Income Tax Officer -14(1)(2),
Mumbai

..... Respondent

Appellant by : Shri N.M.Porwal

Respondent by : Shri V.Justin

Date of hearing : 16/10/2019

Date of pronouncement : 25/10/2019

ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the order of CIT(A) - 29, Mumbai dated 11/03/2015 confirming levy of penalty under section 271(1)(c) of the Income Tax Act 1961 (in short "the Act").

2. Shri N.M.Porwal appearing on behalf of the assessee submitted that the assessee is engaged in business of trading in cloths. In scrutiny assessment proceedings, the Assessing Officer made addition of Rs.19,84,400/- under section 69A of the Act on account of cash deposits in assessee's bank account with Cosmos Co-operative Bank, Pune. The assessee explained that the cash deposits to the tune of Rs.19,60,000/-

were made by one Shri Jawaharlal Jain at Hyderabad and the remaining amount of Rs.24,400/- were deposited by assessee from own source. Subsequently, Shri Jawaharlal Jain died, his son Shri Kishan J. Jain furnished an affidavit before the Assessing Officer that the amount was deposited by his father in the saving bank account of the assessee with Cosmos Co-operative Bank. However, the Assessing Officer disbelieved the affidavit and the contentions of the assessee and made addition of Rs.19,84,400/- and also initiated penalty proceedings under section 271(1)(c) of the Act on the aforesaid addition. The assessee filed appeal before CIT(A) against the addition, but was unsuccessful. Thereafter, the assessee filed second appeal before the Tribunal in ITA No.6142/Mum/2011. The Tribunal vide order date 17/05/2018 restricted the addition to the extent of peak credit in the bank account. The Assessing Officer while giving effect to the Tribunal order confirmed addition only to the extent of Rs.2,99,810/-. The Id.Authorized Representative of the assessee submitted that since substantial addition has been deleted by the Tribunal penalty levied under section 271(1)(c) of the Act on the said addition is not sustainable.

2.1 The Id.Authorized Representative of the assessee further pointed that though the assessee has not raised specific ground in the grounds of appeal, however, the penalty order is liable to be set-aside on the legal ground of defect in levy of penalty. The Id.Authorized Representative of the assessee pointed that while initiating penalty, the Assessing Officer in assessment order has observed that the penalty under section 271(1)(c) of the Act is initiated for 'concealment of income', whereas, in the order

levying penalty dated 31/03/2013, the penalty has been levied under section 271(1)(c) of the Act for furnishing of 'inaccurate particulars of income' and 'concealment of income'. The Honble Bombay High Court in the case of CIT vs. Samson Perinchery, reported as 88 taxmann.com 413(Bom) has held that penalty cannot be levied on a charge other than for which it was initiated.

3. Per contract Shri V. Justin representing the Department vehemently defended the impugned order and prayed for confirming the penalty levied under section 271(1)(c) of the Act.

4. We have heard the submissions made by rival sides and have perused the orders of authorities below. The assessee has challenged levy of penalty on two counts;

(i) since substantial addition made in quantum proceedings have been deleted by the Tribunal, the penalty does not survive,

(ii) the penalty has been levied on a charge other than for which satisfaction was recorded.

5. We observe that penalty of Rs.6,50,640/- under section 271(1)(c) of the Act was levied in respect of addition of Rs.19,84,400/- under section 69A of the Act. The Tribunal vide order dated 17/05/2018 in appeal by assessee in ITA No.6142/Mum/2011 restricted the addition to peak credit in the saving bank account of the assessee. Consequently, the addition was restricted to Rs.2,99,810/-. Thus, while giving effect to the order of Tribunal, substantial addition, made by Assessing Officer was deleted. As

a result of reduction in the addition the penalty is leviable only on the addition confirmed by the Tribunal.

6. The Id. Authorized Representative of the assessee has further raised legal ground that penalty has been levied on a charge other than for which satisfaction has been recorded. A perusal of the assessment order dated 19/12/2010 passed under section 143(3) shows that penalty under section 271(1)(c) of the Act has been initiated for 'concealment of income', whereas penalty has been levied by Assessing Officer vide order dated 31/03/2013 for furnishing 'inaccurate particulars of income' and concealment of income'. The Hon'ble Bombay High Court in the case of CIT vs. Samson Perinchery (supra) has held that penalty can be imposed only on the ground for which penalty proceedings have been initiated. The relevant extract of the observation of the Hon'ble Court reads as under:-

"6. The above submission on the part of the Revenue is in the face of the decision of the Supreme Court in T. Ashok Pal v. CIT [2007] 292 ITR 11/161 Taxman 340 [relied upon in Manjunath Cotton & Ginning Factory, (supra)] - wherein it is observed that concealment of income and furnishing of inaccurate particulars of income in Section 271(1)(c) of the Act, carry different meanings/connotations. Therefore, the satisfaction of the Assessing Officer with regard to only one of the two breaches mentioned under Section 271(1)(c) of the Act, for initiation of penalty proceedings will not warrant/permit penalty being imposed for the other breach. This is more so, as an Assessee would respond to the ground on which the penalty has been initiated/notice issued. It must, therefore, follow that the order imposing penalty has to be made only on the ground of which the penalty proceedings has been initiated, and it cannot be on a fresh ground of which the Assessee has no notice"

7. In the instant case since the penalty has also been levied on a charge other than for which satisfaction has been recorded, we find merit in the legal contentions raised by the assessee during the course of arguments before us. The ambiguity in the mind of Assessing Officer with

regard to charge for levy of penalty under section 271(1)(c) of the Act is apparent from the penalty order. Thus, in the light of the facts of the case and the decision of Hon'ble'ble Jurisdictional High Court, penalty order is unsustainable and is liable to be quashed. The subsequent proceedings arising there from are vitiated and hence, are also liable to be quashed. We hold and direct accordingly.

5. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on Friday the 25th day of October, 2019.

Sd/-
(N.K.PRADHAN)
ACCOUNTANT MEMBER

Sd/-
(VIKAS AWASTHY)
JUDICIAL MEMBER

Mumbai, Dated 25/10/2019
Vm, Sr. PS(O/S)

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai