

**IN THE INCOME TAX APPELLATE TRIBUNAL, JODHPUR BENCHES, "SMC"
JODHPUR
BEFORE: SHRI. N.K.SAINI, VICE PRESIDENT**

ITA No.387/Jodh/2018
Assessment Year : 2014-15

Shri Amar Singh Jain C/o Rajendra Jain, Advocate 106, Akshay Deep Complex, 5th B Road, Sardarpura, Jodhpur	Vs.	The ITO Ward-1, Bhilwara
PAN NO: APUPM0626D		
Appellant		Respondent

Assessee by : Smt. Raksha Birla, C.A
Revenue by : Shri Girish Mehta, JCIT DR

Date of Hearing : 26/11/2019
Date of Pronouncement : 26/11/2019

आदेश/Order

PER N.K. SAINI, VICE PRESIDENT

This is an appeal by the Assessee against the order dt. 14/05/2018 of Ld. CIT(A), Ajmer.

2. The only grievance of the assessee in this appeal relates to the sustenance of penalty of Rs. 65,000/- levied by the Assessing Officer under section 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as 'Act').

3. Facts of the case in brief are that the assessee filed the return of income declaring total income of Rs. 2,45,050/-. The assessee claimed loss of Rs. 8,62,051/- the same was reduced by the A.O. to Rs. 1,95,112/- vide assessment order dt. 06/10/2016 by making the addition on account of unexplained direct expenses and excess claim of indirect expenses. The Assessing Officer also initiated penalty proceedings under section 271(1)(c) of the Act, in respect of excess loss amounting to Rs. 6,62,414/- claimed by the assessee and levied penalty of Rs. 65,000/-.

4. Being aggrieved the assessee carried the matter to the Ld. CIT(A) who sustained the penalty levied by the Assessing Officer.

5. Now the assessee is in appeal.

6. Ld. Counsel for the Assessee drew my attention towards show cause notice issued under section 274 of the Act dt. 06/10/2016 and submitted that no specific charge has been mentioned against the assessee as to whether there was concealment of income or for furnishing of inaccurate particulars of income. It was stated that this issue is squarely covered vide order dated. 03/05/2019 of ITAT Jodhpur Bench in ITA No. 43/Jodh/2019 for the A.Y. 2013-14 in the case of Shri Deepak Sheshrao Bakde Vs. ITO, W-1, Bhilwara, copy of the said order was furnished which is placed on the record.

7. In his rival submissions the Ld. DR strongly supported the orders of the authorities below.

8. I have considered the submissions of both the parties and perused the material available on the record. In the present case it is noticed that the Assessing Officer in the notice under section 274 r.w.s 271(1)(c) of the Act dt. 06/10/2016, copy of which is placed at page No. 1 of the assessee's compilation had not specifically mentioned the charge against the assessee. The similar issue has been adjudicated vide aforesaid referred to order dt. 03/05/2019 by the ITAT Jodhpur Bench wherein the relevant findings has been given in para 6 to 6.3 which read as under:

" 6. Now coming to the merits of the case. In the instant case, the A.O. initiated the penalty proceedings under section 271(1)(c) of the Act for 'furnished inaccurate particulars of income' and thereafter issued the notice u/s 274 without specifying the limb of the penalty impossible and finally imposed penalty for furnished inaccurate particulars of income. Therefore the question emerges as to whether penalty is sustainable, under the facts wherein the notice is not clear and/or issued without specifying the limb of charge.

6.1 *Hon'ble Apex Court vide judgment in case of M/s. SSA's Emerald Meadows, (2016) 73 taxmann.com 248(SC) dismissed the Special Leave Petition filed by the Revenue against the judgment rendered by Hon'ble High Court of Karnataka whereby identical issue was decided in favour of the assessee. Operative part of the judgment in case of M/s. SSA's Emerald Meadows (supra) decided by Hon'ble High Court of Karnataka is reproduced below*

"2. This appeal has been filed raising the following substantial questions of law:

(1) Whether, omission if assessing officer to explicitly mention that penalty proceedings are being initiated for furnishing of inaccurate particulars or that for concealment of income makes the penalty order liable for cancellation even when it has been proved beyond reasonable doubt that the assessee had concealed income in the facts and circumstances of the case?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the penalty notice under Section 274 r.w.s. 271(l)(c) is bad in law and invalid in spite of the amendment of Section 271(1) B) with retrospective effect and by virtue of the amendment, the assessing officer has initiated the penalty by properly recording the satisfaction for the same?

(3) Whether on the facts and in the circumstances of the case, the Tribunal was justified in deciding the appeals against the Revenue on the basis of notice issued, under Section 274 without taking into consideration the assessment order when the assessing officer has specified that the assessee has concealed particulars of income?

3. The Tribunal has allowed the appeal filed by the assessee holding the notice issued by the Assessing Officer under Section 274 read with Section 271(l)(c) of the Income Tax Act, 1961 (for short 'the Act') to be bad in law as it did not specify which limb of Section 271(l)(c) of the Act, the penalty proceedings had been initiated i.e., whether for concealment of particulars of income or furnishing of inaccurate particulars of income. The Tribunal, while allowing the appeal of the assessee, has relied on the decision of the Division Bench of this Court rendered in the case of COMMISSIONER OF INCOME TAX -vs- MANJUNATHA COTTON AND GINNING FACTORY (2013) 359 ITR 565.

4. In our view, since the matter is covered by judgment of the Division Bench of this Court, we are of the opinion, no substantial question of law arises in this appeal for determination by this Court, the appeal is accordingly dismissed."

6.2. The penalty provisions of section 271(l)(c) of the Act are jBF. where the assessee has concealed the particulars of income or furnished inaccurate particulars of such income. It is also a well accepted proposition that the aforesaid two limbs of section 271(l)(c) of the Act carry different meanings. Therefore, it is imperative for the Assessing Officer to strike - off the irrelevant limb so as to make the assessee aware as to what is the charge made against him so that he can respond accordingly.

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 dear 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 off 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. JOT, 291 ITR 519(SC) has also noticed 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.

6.3 In the instant case, from the notice dated 22-01-2014 issued u/s 274 of the Act, it is clear that the Assessing Officer initiated the penalty proceedings by issuing the notice u/s 274/271(l)(c) of the Act without specifying as to whether the assessee has concealed "particulars of income" or assessee has furnished "inaccurate particulars of income", and without striking off the irrelevant words so as to provide adequate opportunity to the assessee to explain the show cause notice, which in our considered view, amounts to non-application of mind because while issuing the notice dated 22-01-2014 u/s 274 of the Act, the A.O. was not clear under which limb, the assessee was supposed to reply and defend its case and under which limb the penalty was supposed to be levied, hence the penalty becomes unsustainable, therefore we have no hesitation to delete the penalty levied by the AO and affirmed by the Ld. CIT (A).

9. Since facts of the present case are similar to the facts of the case in ITA No. 43/Jodh/2019 in the case of Shri Deepak Sheshrao Bakde, Bhilwara Vs. ITO, W-1, Bhilwara dt. 03/05/2019. So respectfully following the aforesaid referred to order dated. 03/05/2019 the penalty levied by the Assessing Officer and sustained by the Ld. CIT(A) is deleted.

10. In the result, appeal of the Assessee is allowed.

(Order pronounced in the open Court on 26/11/2019)

Sd/-
(N.K. SAINI)
VICE PRESIDENT

AG

Date: 26/11/2019

Copy of the order forwarded to :

1. The Appellant
2. The Respondent
3. CIT
4. The CIT(A)
5. DR, ITAT, Jodhpur
6. Guard File