

IN THE INCOME-TAX APPELLATE TRIBUNAL "F" BENCH MUMBAI
BEFORE SHRI PAWAN SINGH JUDICIAL MEMBER AND
SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA No. 5003/Mum/2018 (Assessment Year 2004-05)

Shri Vivek Talwar 17-B, Ill Palazzo, Ridge Road, Malabar Hill, Mumbai-400006. PAN: AAAPT3994Q	Vs.	ACIT, Central Cricle-46, Room No. 659, 6 th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020.
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Appellant

Respondent

ITA No. 5004/Mum/2018 (Assessment Year 2005-06)

Shri Vivek Talwar 17-B, Ill Palazzo, Ridge Road, Malabar Hill, Mumbai-400006. PAN: AAAPT3994Q	Vs.	ACIT, Central Cricle-46, Room No. 659, 6 th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020.
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Appellant

Respondent

Appellant by : Shri Vimal Punmiya (AR)

Respondent by : Shri Mohammed Rizwan (DR)

Date of Hearing : 12.12.2019

Date of Pronouncement : 12.12.2019

ORDER UNDER SECTION 254(1) OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. This two appeal by assessee are directed against the separate order of Id. CIT(A)-50, Mumbai both dated 01.06.2018 for Assessment Year 2004-05 & 2005-06. In both the appeals, the assessee has raised certain common grounds of appeal. Facts for both the year are almost common to certain extent. Therefore, both the appeals were clubbed, heard together and are decided by a common order to avoid the conflicting

decision. With the consent of parties, the appeal for A.Y. 2004-05 is treated as lead case. In appeal for A.Y. 2004-05, the assessee has raised the following grounds of appeal:

1. On the facts and circumstances of the case and law, the Ld. CIT(A) erred in confirming the penalty levied of Rs.60,781/- u/s 271(1)(c) of the Income Tax Act, 1961 by the Ld. Assessing Officer.

2. The Ld. CIT(A) failed to consider that:

a) Assessee has neither furnished any inaccurate particulars of income nor concealed any income.

b) Rent income of Court Chambers property was fixed since from 1967 and same was offered by assessee and accepted by the revenue. Therefore, suddenly revalued fair rent does not amount to concealment or furnish inaccurate particulars. Hence penalty cannot be levied.

c) Legal and professional fees amounting to Rs.65,000/- paid to Ajay Maijithia for representing assessee before appellant authority against order passed by Directorate of Enforcement and same is claimed but not allowed as expenditure does not amount to inaccurate particulars.

d) Penalty proceedings are separate then Assessment proceedings. Penalty cannot be levied just because some addition was made in assessment.

e) Penalty cannot be levied without any new finding.

f) Penalty cannot be levied for mere difference in opinion on valuation of fair rent of house property.

2. The assessee vide application dated 10.12.2019 raised the following additional ground of appeal:

4. On the facts and circumstances of the case and in law, the ld. AO erred in initiating the penalty proceeding by not specifying in the notice as to the whether the penalty was for concealment of income or furnishing of inaccurate particulars of income. Therefore, the penalty imposed was void ab-initio.

3. Brief facts of the case as gathered from the orders of lower authorities that assessee filed his return of income for A.Y. 2004-05 on 06.08.2004 declaring income of Rs. 42.76 lakhs. A search was carried out in Nitco Group of Companies on 03.08.2009. The assessee is a part of Nitco Group of Companies. Accordingly, the assessee was also covered. Consequent of search, notice under section 153A was issued to the assessee on 24.11.2009. In response to the notice under section 153A, the assessee filed his return of income on 08.01.2010 declaring the same income as declared earlier. In the computation of income, the assessee has shown income from House Property being 50% owner in a property (unit), in Court Chambers, New Marine Lines and shown income of Rs. 9,751/- as rent from the said property and claimed 30% deduction, accordingly, offered Rs. 6,826/- as Income from House Property. However, the Assessing Officer estimated the Annual Letting Value (ALV) of property at Rs. 3.60 Lakhs. The assessee being 50% owner of the said property, accordingly, half of the ALV was treated as Rs. 1.80 lakhs after granting 30% deduction, the ALV of the property was treated as Rs. 1.26 Lakhs. The Assessing Officer also disallowed legal and professional fees paid to Shri Ajay Majithia, Advocate for representing the assessee before the Directorate of Enforcement on the ground that the same is not allowable expenditure. The addition was unsuccessfully contested before the Id. CIT(A) and on further appeal before the

Tribunal, the matter was restored back to the file of Assessing Officer, on the contention of assessee that where the property is controlled by Rent Control Act, the Assessing Officer has not option than to accept the actual rent received or municipal rateable value, whichever is higher under the provisions of section 23(1)(a). In case property is controlled by Rent Control Act, then the Assessing Officer is free to determine ALV after giving due opportunity to the assessee to submit the possible rateable value/market rent as is one of the contention than value adopted by the Assessing Officer was high. The issue of legal expenses was also restored, if the same was incurred for the purpose of business of assessee then allowable under section 37(1). However, the Assessing Officer in *denovo* proceedings again upheld both the additions by taking view that assessee failed to furnish necessary evidence and submission. No further appeal was filed by assessee before the Id. CIT(A), the Assessing Officer levied the penalty under section 271(1)(c) on both the additions/disallowance was again sustained in assessment order dated 28.12.2011. The Assessing Officer initiated the penalty under section 271(1)(c) and accordingly levied a penalty of 100% of tax sought to be evaded on such disallowances. The Assessing Officer worked out the penalty of Rs. 60,781/- in its order dated 30.03.2014. On further appeal before the Id. CIT(A), the action of Assessing Officer in levying the

penalty was affirmed. Thus, further aggrieved by the order of Id. CIT(A), the assessee has filed this appeal before the Tribunal.

4. We have heard the submission of Id. Authorized Representative (AR) of the assessee and Id. Departmental Representative (DR) for the revenue and perused the material available on record. The Id. AR of the assessee submits that though the assessee has raised additional ground of appeal for not specifying the specific charge in the notice under section 274 r.w.s. 271(1)(c), however, he is not pressing the same.
5. The Id. AR of the assessee further submits that assessee is 50% owner of a unit/property situated at Court Chamber, New Marine Lines, which was rented out since 1967, the rent was fixed as per agreed term at the time of letting. The assessee received a rent of Rs. 9,751/- for the said property and after claiming standard deduction, income of Rs. 6,825/- was offered. The same income as Income from House Property, was being accepted by revenue from last more than 25 years. The Municipal Value of the property is also at Rs. 9,600/-, the Id. AR of the assessee submits that the copy of assessment order about the rateable value assessed by assessor and Collector of Mumbai Municipal Corporation is placed on record, wherein the rateable value of the property is Rs. 5,920/- and monthly rental value is shown at Rs. 800/-, the copy of order of Assessor and Collector of Mumbai Municipal Corporation is placed on record as per page no. 31 to 35 of Paper Book. The assessee is offered

the same rental income under bonafide belief and is being accepted by the revenue from the last 25 years. The Assessing Officer estimated the ALV of property at Rs. 3.6 lakhs and after determining 50% share of the assessee and allowing 30% deduction made addition of Rs. 1,26,000/-. On such addition on notional income, there is no justification on levying the penalty. The assessee has shown Income from House Property in the return of income. The assessee has no intention to conceal the notional fair rental value and accordingly, no penalty is leviable. In support of his submission, the Id. AR of the assessee relied upon the decision of Shri Suresh Shivlal Bhasin vs. ACIT in ITA No. 1705 & 1707/Mum/2017, Kamalakar Manohar Haval vs. ITO in ITA No. 1170-1173/PN/2010 and Kadar Khan vs. ACIT in ITA No. 494/Mum/2012.

6. In other alternative submission, the Id. AR of the assessee submits that mere making a claim, which is not sustainable in law by itself will not amount to furnishing inaccurate particulars of income, the assessee has disclosed all the facts which is not in dispute that the actual rent has been offered by assessee for taxing. It is a legal claim of the assessee. Mere disallowance on legal claim cannot be a ground for levy of penalty, when all facts were explained. There is no question of levy of penalty. In support of his submission, the Id. AR of the assessee relied upon the decision of Hon'ble Supreme Court in CIT vs. Reliance Petro products (P.) Ltd. (322/230 CTR 320 ITR 158 (SC)).

7. In other alternative submission, the Id. AR of the assessee submits that no penalty can be levied for mere difference of opinion. In support of his submission, the Id. AR of the assessee relied upon the decisions of (i) ITO vs. Oasis Securities Ltd. [(2010) 37 SOT 63] (ii) CIT (Central) vs. Sanitary Improvement & Tiles Mfg. Co. (133 ITR 334) (iii) CIT vs. Prem Das (No.1) 248 ITR 234 2001 (P&H) (iv) ACIT vs. Firmenich Aromatics (India) Pvt. Ltd. ((TA No. 4654/Mum/2009) (v) Sarnath Infrastructure (P) Ltd. vs. ACIT [(2009) 120 TTJ (LUC) 216] & (vi) CIT vs. Caplin Point Laboratories Ltd. (Mad) 293 ITR 524 Madras.
8. In other alternative submission, the Id. AR of the assessee submits that if income assessed on estimation basis, no penalty can be levied. The Id. AR of the assessee submits that there is no iota of evidence on record to show that there is any positive concealment, since addition is based on estimation basis, which itself would not lead to conclusion that assessee either concealed the property of income or furnished inaccurate particulars. In support of his submission, the Id. AR of the assessee relied upon the decision of Harigopal Singh vs. CIT [2002 258 ITR 85], CIT vs. S.Rahmat Khan Birbalkhan Badruddin [1999 240 ITR 778] and CIT vs. Smt. Meenakshi Kutty [(2002) 258 ITR 494].
9. The Id. AR of the assessee on the disallowance of professional fees of Rs. 65,000/- submits that legal fees of Rs. 65,000/- was paid to Shri Ajay Majithai, Advocate, for representing the assessee before the Enforcement

Directorate. The fee was paid through cheque. Before the Assessing Officer, the assessee explained the purpose for payment of fees to Advocate. In support of his contention, the assessee relied upon the decision of CIT vs. Dhanrajgiri Raja Narsinghrai (91 ITR 544) & Modi Sugar Mills Ltd. vs. CIT (90 ITR 201). The Assessing Officer without discussing the facts of those case held that facts are identical and disallowed the entire expenses in restoration proceeding, the assessment order was passed in a hurriedly manner. The Assessing Officer disallowed the entire/expenses. No fair and property opportunity was given to the assessee and both the addition was upheld without verification of facts. The ld. AR of the assessee submits that the assessee has not challenged the addition before the First Appellate Authority (FAA) due to smallness of amount and to avoid the cost of protected litigation. The Assessing Officer disallowed the expenses without verification of fact. On such disallowances, no penalty is leviable.

10. On the other hand, the ld. DR for the revenue relied upon the order of Assessing Officer. The ld. DR for the revenue submits that despite granting opportunity by Hon'ble ITAT, the assessee failed to appear before the Assessing Officer to substantiate the expenditure on legal expenses as well as to substantiate his contention on ALV of the property. The assessee has not filed any further appeal and accepted both the additions.

11. We have considered the rival submissions of the parties and have gone through the orders of authorities below. The facts are not in dispute that the Assessing Officer made addition on account of Income from House Property by determining the notional ALV of house property. Further, there is no dispute that the assessee claimed legal expenses of Rs. 65,000/-, which was disallowed. On both the issue, the assessee filed appeal before the Tribunal, which were restored to the file of Assessing Officer vide order dated 04.09.2010 in ITA No. 6250-6251/Mum/2008. The Assessing Officer again affirmed both the additions by holding that assessee has not filed any details and failed to discharge his onus in assessment order passed under section 153A r.w.s. 143(3) r.w.s. 254 dated 28.12.2011. As per the facts available on record in the assessment order passed under section 143(3) r.w.s. 254 dated 28.12.2011 that neither the assessee appeared before the Assessing Officer nor the Assessing Officer examined the fact as per direction of Tribunal. The assessing Officer passed the assessment order by taking view that assessee failed to appear on the date of hearing and that assessee has shown utter disregard to the direction of Tribunal.

12. Thereafter, the Assessing Officer initiated the penalty proceeding. Notice under section 271(1)(c) r.w.s. 274 was issued on 10.10.2013. The assessee filed his reply dated 30.10.2013. On issue no. 1 i.e. adding notional ALV, the assessee stated that valuation of ALV is an estimated

figure which is vary from person to person, therefore, cannot be termed as a concealment of income. It is just a difference of opinion. On the issue of disallowance of legal expenses, the assessee stated that the difference of opinion cannot be a ground for levy of penalty, the assessee further stated that expenses were incurred wholly and exclusively for the purpose of business. The expenses were incurred for representing the assessee before Enforcement Directorate for alleged contravention on provision of section 9(1)(c) of the Act and ultimately the appellate Tribunal of Enforcement granted 50% waiver of pre-deposited.

13.The reply filed by assessee was not accepted by Assessing Officer by taking view that explanation (1) to section 271(c) automatically come into operation in respect of any fact material to the computation of total income, when there is failure to offer any explanation or an explanation offered is found to be false, or not substantiated. The Assessing Officer, accordingly, levied the penalty @ 100% of the tax sought to be evaded and worked out the penalty of Rs. 60,780/- in its order dated 30.03.2014.

14.We have noted that the Assessing Officer while passing the assessment order initiated the penalty for furnishing inaccurate particulars of income, however, while passing the assessment order, the Assessing Officer levied the penalty by taking view that the assessee deliberately concealed the income and filed inaccurate particulars of income within the meaning of section 271(1)(c) r.w. Explanation (1) thereto.

15. The coordinate bench of Tribunal in Suresh Shivilal Bhasin (supra) on the issue of disallowance on account of notional ALV, while considering the issue of penalty under section 271(1)(c) held as under:

“5. We have heard the learned DR and perused the material on record. As could be seen from the facts on record, the imposition of penalty u/s. 271(1)(c) of the Act in both the assessment years were made on the basis of additions on account of disallowance of interest expenditure and notional house property income. In so far as disallowance of interest expenditure is concerned, as could be seen from the submissions made by the assessee before the learned CIT(A), the assessee has availed of overdraft facility from Dena Bank and out of the funds borrowed from overdraft account investment was made in taxable bonds of RBI as well as fixed deposit. It is further evident from the submissions of the assessee; against the interest income earned from taxable bonds and fixed deposits, which was offered as income, assessee has set off the interest expenditure incurred on account of funds borrowed from the overdraft account. This claim of set off of interest expenditure against interest income has been rejected by the Assessing Officer in course of assessment proceedings. Thus, as could be seen from the facts on record, under a bona fide belief that interest expenditure incurred on the overdraft facility is allowable against the interest income earned by investing the funds borrowed from the overdraft account assessee has claimed the expenditure. This, in our view, neither leads to furnishing of inaccurate particulars of income nor concealment of income. Hence, assessee’s explanation that the conditions of section 271(1)(c) of the Act are not satisfied appears to be plausible. That being the case, no penalty u/s. 271(1)(c) of the Act can be imposed on account of disallowance of interest expenditure. As regards imposition of penalty on the addition made on account of notional house property income, it goes without saying that in reality the assessee has not earned any income from house property. The Assessing Officer himself has observed that the addition made on account of income from house property is notional. In that view of the matter, penalty u/s. 271(1)(c) of the Act cannot be imposed in respect of addition made on account of notional income from

house property. Thus, on over all consideration of facts and circumstances, we are of the opinion that imposition of penalty u/s. 271(1)(c) of the Act, in the facts of the present appeals is not justified. Accordingly, we delete the penalty imposed u/s. 271(1)(c) of the Act in both the assessment years under appeal.”

16. So far as disallowance on account of legal expenses is concerned, we have noted that the Assessing Officer disallowed the expenses without verification of fact or making any investigation. The assessee claimed that the expense was paid to Advocate for representing the assessee before Enforcement Directorate. This fact is not controverted by Assessing Officer by bringing any adverse material on record.

17. Considering the aforesaid facts and circumstances of the case, we are of the view that the addition on account of notional ALV was based on estimation basis and addition on account of disallowance of legal expenses were made without verification of fact and making any independent enquiry/investigation. We are conscious of the fact that penalty proceeding are separate and independent. Though, no further appeal after sustaining the addition in assessment order passed under section 153A r.w.s 143(3) r.w.s. 254 dated 28.12.2011, is filed by the assessee, this fact itself would not sufficient to sustain the penalty, as the penalty proceeding are separate and independent and has to stand on different footings

18. In our view on such addition/disallowance, no penalty is leviable. Accordingly, we direct the Assessing Officer to delete the penalty on

both the additions. Thus, the grounds of appeal raised by assessee are allowed.

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

ITA No. 5004/Mum/2018 for A.Y. 2005-06

20. We have noted that in the present case, the Assessing Officer levied the penalty on making addition on notional ALV of house Property. Considering the fact that on similar disallowance, we have deleted the similar penalty for A.Y. 2004-05. Therefore, considering the decision for A.Y. 2004-05, the penalty for the year under consideration is also deleted with similar directions.

21. In the result, appeal of the assessee is also allowed.

Order pronounced in the open court on 12/12/2019.

Sd/-
S. RIFAUR RAHMAN
ACCOUNTANT MEMBER

Sd/-
PAWAN SINGH
JUDICIAL MEMBER

Mumbai, Date: 12.12.2019

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Copy of the Order forwarded to :

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| 1. Assessee | 2. Respondent |
| 3. The concerned CIT(A) | 4. The concerned CIT |
| 5. DR "F" Bench, ITAT, Mumbai | |
| 6. Guard File | |

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai