

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "H", MUMBAI**

**BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND
SHRI AMARJIT SINGH, JUDICIAL MEMBER**

**ITA No.4554/M/2018
Assessment Year: 2010-11**

M/s. Krish Developers, 3 & 4, Unique Vaibhav, Tirupati Nagar-1, Bolinj, Virar (West), Thane PAN: AAIFK0931E	Vs.	ACIT Circle-4, A Wing, 4 th Floor, Ashar IT Park, Road No.16Z, Ambika Nagar, Wagle Estate, Thane – 400 604
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Vimal Punmiya, A.R.
Revenue by : Shri S. Michael Jerald, D.R.

Date of Hearing : 26.11.2019
Date of Pronouncement : 19.12.2019

ORDER

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the assessee against the order dated 08.05.2018 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2010-11.

2. The only issue challenged by the assessee in the various grounds of appeal is the confirmation of penalty of Rs.5,00,548/- by Ld. CIT(A) as levied by the AO under section 271(1)(c) of the Act.

3. The assessee has also raised additional grounds vide application dated 25.11.2019 which is reproduced as under:

“4. On the facts and circumstances of the case and in law, the Ld CIT(A) is not justified in confirming the order passed by Learned AO u/s 271(I)(c) which is bad in law as the assessment order issued is not sure as to whether the penalty proceedings is initiated for furnishing of inaccurate particulars of income or concealment of income. Therefore the Penalty imposed is void ab initio.”

4. The Ld. A.R. submitted that the legal issue being raised is emanating out of the assessment records and therefore no new facts are required to be verified at the level of AO. The Ld. A.R. prayed before the Bench that since the issue is purely of legal and jurisdictional nature, the same may kindly be admitted in the interest of justice and fairplay. In defence of his argument, the Ld. A.R. relied on the following decisions:

1. National Thermal Power Company Ltd. vs. CIT 229 ITR 383 (SC)
2. CIT vs. Pruthvi Brokers and Shareholders Pvt. Ltd. (2012) 349 ITR 336 (Bom.) and
3. Jute Corporation India vs. CIT (1991) 187 (ITR) 688.

5. The Ld. D.R., on the other hand, opposed the admission of additional grounds on the plea that this ground was not raised at the time of filing of appeal before the Tribunal nor raised before the first appellate authority, therefore the admission of additional ground may kindly be denied at this stage of adjudication.

6. After hearing both the parties and perusing the material on record, we observe that the issue raised by the assessee is purely of legal and jurisdictional in nature which arose out of the assessment records only and no further verification of facts is required so far as the admission of additional ground is concerned. We are therefore inclined to admit the same for the adjudication by following the ratio laid down in the National Thermal Power Company Ltd. vs. CIT (supra), CIT vs. Pruthvi

Brokers and Shareholders Pvt. Ltd. (supra) and Jute Corporation India vs. CIT (supra).

7. The facts in brief are that the AO issued notice under section 274 read with section 271 of the Act dated 18.03.2013. In the said notice the AO has not struck off the one of the two limbs of penalty i.e. for concealment of income or for furnishing of inaccurate particulars of income which was not relevant. Moreover, in the assessment order dated 18.03.2013 passed under section 143(3) of the Act, the assessee has recorded a satisfaction that assessee has concealed the income as it has furnished the inaccurate particulars of income and therefore the same is liable for initiation of penalty proceedings under section 274 read with section 271 of the Act. In the said penalty order passed dated 27.09.2013 the AO has recorded the satisfaction that assessee is liable for penalty under section 271(1)(c) of the Act for the concealment of income to the tune of Rs.16,19,896/-. It is pertinent to note that assessee has not filed any appeal against quantum addition.

8. The Ld. A.R. referring to the notice dated 18.03.2013 submitted that the said notice has been issued in a mechanical manner without application of mind by the AO as the AO has failed to strike off one of the two limbs which is not relevant for imposition of penalty thereby the assessee is deprived off from responding to the specific charge on which the penalty is proposed to be levied. The ld AR submitted before the bench that in such a scenario, the penalty as imposed by the AO is bad in law. The Ld. A.R. in defence of his argument relied on the following decisions:

a) CIT Vs SSA's Emerald Meadows(SC) (2016) 73 Taxmann.com 241 Karnataka – SLP dismissed as reported in (2016) 73 Taxmann.com 248 (SC)

b) CIT vs. Manjunath Cotton and Ginning Factory (2013) 359 ITR 565 (Kar.)

c) CIT vs. Shri Samson Perinchery (2017) 392 ITR 4 (Bom.)

d) CIT vs. Mrs. Piedade Perinchery ITXA No.1310 of 2014 order dated 10.01.2017 (Bom. – HC)

9. The Ld. D.R., on the other hand, submitted that there is no merits in the arguments of the Ld. A.R. that AO has failed to mention one of the two limbs on which the penalty was proposed to be levied. The ld DR argued that the AO has correctly issued notice specifying the penalty charges on which the penalty could be levied and finally levied the penalty for concealment of income. In view of these facts, the Ld. D.R. submitted that the additional ground raised by the assessee may kindly be dismissed.

10. After hearing both the parties and perusing the material on record, we observe that in this case the notice has been issued under section 274 read with section 271 of the Act without mentioning the limb on which the penalty was proposed to be levied i.e. the AO has not struck off irrelevant and redundant limb in the notice thereby not affording the assessee an opportunity to respond the charge on which the penalty was proposed to be levied. In our view, the non mentioning of the charge on the penalty notice is bad in law and goes to the root of the penalty proceedings and the penalty order passed consequent to the said notice can not be sustained. The Hon'ble Bombay High Court in the Case CIT Vs Shri Samson Perinchery & CIT vs. Mrs. Piedade Perinchery (supra) has held that penalty

can not be levied where the AO has issued notice in a mechanical manner without striking off the redundant limb or without mentioning the limb on which the penalty is proposed to be levied. In view of the above discussion and in the light of the ratio laid down by the Hon'ble Bombay High Court, we are inclined to set aside the order of Ld. CIT(A) and direct the AO to delete the penalty.

11. Since the issue has been decided on legal issue in favour of the assessee, the merit becomes academic and need no adjudication.

12. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 19.12.2019.

Sd/-
(Amarjit Singh)
JUDICIAL MEMBER

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

Mumbai, Dated: 19.12.2019.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.