

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "SMC", MUMBAI

BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI N.K.PRADHAN, ACCOUNTANT MEMBER

ITA NO.172/MUM/2019(A.Y.2010-11)

Madhukant Vandravandas Sanghvi,
C/23, Krishnalaya CHS, N.S.Manikar Marg,
Sion, Mumbai 400 022.

PAN: AAPPS1903F

..... Appellant

Vs.

ITO Ward 26(2)(2),
C-11, Room No.704, 7th Floor,
Pratykshkar Bhavan, BKC,
Bandra (E), Mumbai 400 051

..... Respondent

Appellant by : None
Respondent by : Shri Dharm Veer Singh

Date of hearing : 14/01/2020
Date of pronouncement : 14/01/2020

ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the order of Commissioner of Income Tax(Appeals)-38, Mumbai [in short 'the CIT(A)'] dated 24/08/2018 for the assessment year 2010-11 confirming levy of penalty under section 271(1)(c) of the Income Tax Act, 1961 (in short 'the Act').

2. The notice of the appeal was sent to the assessee through RPAD on 05/12/2019. As is evident from the acknowledgment card available on record, the notice was duly served on the assessee. Despite service of notice neither the assessee nor authorized representative of the assessee was present in the Court to

defend the appeal. It seems that assessee is not interested in pursuing the matter before the Tribunal. The appeal is taken up for adjudication with the assistance of Id. Departmental Representative and the material available on record.

3. Brief facts of the case as emanating from the records are: The assessee is a trader in iron and steel products. The assessment for assessment year 2010-11 was reopened by the Assessing Officer on the basis of information received from DGIT(Inv) regarding assessee's involvement in dealing with hawala operators. In reassessment proceedings the Assessing Officer observed that the assessee has obtained bogus purchase bills from various parties aggregating to Rs.35,81,438/-. The Assessing Officer made addition of Rs.4,47,680/- i.e. 12.5% of non-genuine purchases. The Assessing Officer further initiated penalty proceedings under section 271(1)(c) of the Act. The Assessing Officer vide order dated 26/08/2016 levied penalty of Rs.1,18,258/- for concealment of income. Aggrieved against the order levying penalty, the assessee filed appeal before the CIT(A). The CIT(A) vide impugned order dismissed the appeal of assessee and confirmed the penalty levied under section 271(1)(c) of the Act. Hence, the present appeal by the assessee.

4 Shri Dharm Veer Singh representing the Department vehemently defended the impugned order and prayed for dismissing the appeal of assessee.

5. We have heard the submissions made by Id. Departmental Representative and have perused the orders of authorities below. At the outset, we observe that while recording satisfaction for levying of penalty under section 271(1)(c) of the Act, the Assessing Officer has observed as under:-

“Penalty proceedings under section 271(1)(c) are separately initiated for furnishing inaccurate particulars of income and for concealing the income.”

Whereas while levying penalty under section 271(1)(c) of the Act vide order dated 26/08/2016, the penalty has been levied for concealment of income. The Hon'ble Bombay High Court in the case of CIT vs. Samson Perinchery reported as 88 Taxman 413(Bom) has held that the order imposing penalty has to be made only on the ground for which the penalty proceedings have been initiated and it cannot be on fresh ground of which the assessee has no notice.

6. In the present case, we observe that the Assessing Officer was not clear in his mind as to which limb of section 271(1)(c) of the Act would get attracted for levy of penalty. Therefore, he mentioned both the charges of section 271(1)(c) of the Act. The Honble Supreme Court of India in the case of T. Ashok Pai vs. CIT, 292 ITR 11 has held that concealment of income and furnishing inaccurate particulars of income carry different connotations. The Hon'ble Gujarat High Court in the case of CIT vs. Manu Engg., 122 ITR 306 has held that levy of penalty has to be clear as to the limb for which it is levied. Where the position is unclear, penalty is not sustainable. From the above referred judgments it is explicitly clear that penalty cannot be sustained where the charge is vague. In the instant case the Assessing Officer has initiated penalty proceedings for furnishing inaccurate particulars of income and for concealing the income. The manner in which Assessing Officer has recorded satisfaction for initiating penalty proceeds by invoking both the charges under section 271(1)(c) of the Act and thereafter, levied penalty on the charge of concealment of income alone indicates that there was ambiguity in the mind of Assessing Officer with regard to the charge on which penalty is to be levied. The penalty provisions cannot be invoked in an ambiguous manner. Our view is supported by the decision rendered by Hon'ble Karnataka High Court in the case of CIT vs. Manjunatha Cotton & Ginning Factory, reported as 359 ITR 565(Kar). The

penalty under section 271(1)(c) of the Act, is liable to be deleted on this legal ground. We hold and direct accordingly.

7. We further observe that even on merits the penalty is not sustainable. The addition has been made by Assessing Officer on mere estimation of GP on the alleged bogus purchases. It is a well settled law that penalty proceedings are unsustainable on estimated additions. We find merit in the appeal of the assessee. Hence, the impugned order is set aside and appeal of the assessee is allowed.

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

Order pronounced in the open court on Tuesday, the 14th day of January, 2020.

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

Sd/-
(VIKAS AWASTHY)
JUDICIAL MEMBER

Mumbai, Dated 14/01/2020
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