

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

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER

&

SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

ITA No.7138/Mum/2018
(Assessment Year: 2009-10)

Munir Khan 1404, 'A' Wing Raj Classic Bldg Off. Yari Road, Versova Andheri(W) Mumbai-400 061	Vs.	DCIT, Central Circle-7(1) 654, 6 th Floor Aaykar Bhawan M.K.Road Mumbai-400 020
PAN/GIR No.ASGPK3313A		
(Appellant)	..	(Respondent)

&

ITA No.6755/Mum/2018
(Assessment Year: 2009-10)

DCIT, Central Circle-7(1) 654, 6 th Floor Aaykar Bhawan M.K.Road Mumbai-400 020	Vs.	Munir Khan 1404, 'A' Wing Raj Classic Bldg Off. Yari Road, Versova Andheri(W) Mumbai-400 061
		PAN/GIR No.ASGPK3313A
(Appellant)	..	(Respondent)

Assessee by	Shri Prateek Jain & Shri Mani Jain, AR's
Revenue by	Shri Abhijit Patankar, CIT-DR
Date of Hearing	20/01/2020
Date of Pronouncement	10/02/2020

आदेश / O R D E R

PER G.MANJUNATHA (A.M):

These cross appeals filed by the assessee, as well as the revenue are directed against order of the Ld. Commissioner of Income tax (Appeals)-49, dated 28/09/2018 and they pertain to AY

2009-10. Since, the facts are identical and issues are common, for the sake of convenience, these appeals were heard together and are disposed-off by this consolidated order.

2. The assessee has raised the following grounds of appeal.

1. *On the facts and circumstances of the Appellant's case and in Law, the notice issued under section 274 read with section 271(l)(c) by the Ld. Assessing Officer without recording any satisfaction is bad in law and the consequential penalty order passed under section 271(l)(c) of the Act is bad in law and not sustainable in the eyes of law.*

2. *On the facts and circumstances of the appellant's case and in law, Ld Commissioner of income Tax (Appeals) erred in not quashing the penalty levied u/s 271(l)(c) in spite of the fact that penalty provisions of 271(l)(c) are not applicable to the facts since assesses fall under the provisions of section 271AAA of the Act.*

3. *On the facts and circumstances of the appellant's case and in law the Ld Commissioner of Income Tax (Appeals) erred in confirming the action of Ld. Assessing Officer's in imposing penalty of Rs. 51,66,000/- (approx.) by invoking provisions of section 271(l)(c) of the Income Tax Act, 1961.*

3. The revenue has raised the following grounds of appeal.

"On the facts and circumstances of the case, the Ld. CIT(A) has erred in limiting the penalty u/s 271(1)(c) of Rs. 4,43,49,149/- to Rs.58,46,280/- stating that the concealed income as per assessment order was reduced by ITAT from Rs. 13,04,77,050^ to Rs. 1,72,20,000/- without appreciating that the Department has filed appeal u/s 260 A before the Hon'ble High Court with respect to the same and the decision is pending

4. The brief facts of the case are that in the case of the assessee a search and seizure action u/s 132 of the I.T.Act, 1961 was conducted on 28/02/2009. During the course of search, various incriminating materials found, which includes rough cash books investments in mutual funds and fixed deposits. During the course of search, a statement u/s 132(4) of the Act was recorded on 28/02/2009, where the assessee has offered credit entries appearing

in the bank accounts, as its undisclosed income. The assessee had also, included cash withdrawals for household expenses and ceremonial expenses etc. Consequent to a search, the assessee has filed his return of income for AY 2009-10 on 30/09/2009, declaring total income of Rs.38,07,89,861/-. The assessment has been completed u/s 143(3) r.w.s. 153A of the I.T.Act, 1961, on 23/12/2010, determining the total income at Rs. 56,69,06,808/- by making additions on account of unexplained cash deposits in bank accounts of Rs. 18,61,16,947/-. The assessee has filed appeal against assessment order passed u/s 143(3) r.w.s 153A of the I.T.Act, 1961, before the Ld.CIT(A). The Ld.CIT(A), for the reasons stated in his appellate order, dated 27/02/2014 restricted the total income of the assessee at Rs. 51,12,66,911/-, thereby allowed a relict of Rs. 5,56,39,897/- towards additions made on account of unexplained cash deposits in banks and sustained the balance of additions of Rs. 13,04,77,050/-. The assessee has filed, further appeal against the order of the Ld.CIT(A) before the ITA. The ITAT, vide its order dated 10/11/2017 in ITA No. 3247/Mum/2014 has allowed further relief to the assessee and out of total additions made by the Ld. AO on account of unexplained cash deposits in bank account of Rs. 18,61,16,947/- sustained additions of Rs. 1,72,20,000/-, on the basis of estimation of cash withdrawals for household expenses and ceremonial expenses etc and balance amount of Rs. 16,88,96,947/- has been deleted.

5. Thereafter, the Ld. AO has initiated penalty proceedings, u/s 271(1)(c) of the I.T.Act, 1961 and issued a show cause notice u/s 274 r.w.s. 271(1)(c) and called upon the assessee to explain, as to why penalty shall not be levied for concealment of particulars of

income. In response, the assessee has filed detailed written submission and submitted that, he has neither concealed particulars of income nor furnished inaccurate particulars of income. The Ld. AO, after considering relevant submissions of the assessee and also, taken support from certain judicial precedents, including the decision of Hon'ble Supreme Court, in the case of Union of India vs Dharmendra Textile Processors (2008) 13 SCC 369, opined that the assessee has furnished inaccurate particulars of income within the meaning of section 271(1)(c) of the I.T.Act, 1961 and accordingly, levied penalty of Rs. 4,43,49,149/-, which is equivalent to 100% of tax sought to be evaded.

6. Aggrieved by the penalty order, the assessee preferred an appeal before the Ld.CIT(A). Before the Ld.CIT(A), the assessee has challenged the penalty levied by the Ld. AO on technical ground, in light of certain judicial precedents, including the decision of Hon'ble Supreme Court, in the case of CIT vs SSA's Emerald Meadows (2016) 73 taxmann.com 248 and argued that the penalty order passed by the Ld. AO is *void ab-initio* and liable to be quashed, because the Ld. AO has initiated penalty proceedings, without striking of inapplicable part of show cause notice issued u/s 274 r.w.s. 271(1)(c), which clearly indicates that the Ld. AO has not applied his mind before initiation of penalty proceedings. The assessee had also, taken another legal argument, in light of the provisions of section 271AAA and argued that the penalty order passed by the Ld. AO u/s 271AAA of the I.T.Act, 1961, is bad in law and liable to be quashed, because the Ld. AO has levied penalty under incorrect provisions of the Act, in a cases, where search is

conducted, because the correct provisions of the Act, under which penalty can be levied in a cases, where search is conducted is section 271AAA . The assessee had also argued the case on merits and submitted that the additions made by the Ld. AO towards undisclosed income on account of unexplained cash deposits in bank account is purely on estimation basis, which is evident from the fact that the additions made by the Ld. AO has been finally sustained by the appellate authorities to the extent of Rs. 1,72,00,000/-, as against total additions made by the Ld. AO of Rs. 18,61,16,947/-, that too on estimation of unexplained expenditure incurred by the assessee for household and ceremonial expenses. Therefore, the rigors of penalty provisions of section 271(1)(c) of the I.T.Act, 1961, cannot be invoked.

7. The Ld.CIT(A), after considering relevant submission of the assessee and also, taken note of the provisions of section 271(1)(c) and 271AAA of the Act, rejected legal arguments taken by the assessee, on the ground that although, penalty is leviable u/s 271AAA, in a cases, where search is conducted on or after 01/06/2007, but, fact remains that in this case, the addition has been made on estimated income. Therefore, penalty if any on such additions can be levied only under section 271(1)(c) of the Act, but not u/s 271AAA of the Act. As regards, penalty levied by the Ld. AO towards additions made on account of undisclosed income, the Ld.CIT(A) observed that the additions made by the Id. AO towards estimation of undisclosed income, on the basis of credits found in bank account for the remaining part of the year is on sound footing, because during course of search, incriminating documents in the form of rough cash book for part of the year has been found, as per

said document, the assessee has agreed undisclosed income on account of cash receipts from his profession, which was deposited in undisclosed bank accounts. He, further noted that although, the Ld. AO has levied penalty on total additions made in assessment proceedings, but, fact remains that the ITAT has finally sustained additions to the extent of Rs. 1,72,20,000/-. Therefore, he opined that penalty, if at all is leviable, it can be levied only on the additions finally sustained by the ITAT and accordingly, sustained penalty levied by the Ld. AO u/s 271(1)(c) of the Act, to the extent of additions finally sustained by ITAT and balance penalty levied on the additions, which has been deleted by the ITAT has been deleted. The relevant findings of the Ld.CIT(A) are as under:-

6.5 It is seen from the above provisions that penalty under section 271AAA is leviable on the undisclosed income of the specified previous year In this case, assessment year 2009-10 is the specified previous year as the search happened on 29.02,2009. There is no dispute regarding the specified previous year. But the dispute is about the income on which penalty has been levied. The assessee's contention is penalty has to be levied under section 271AAA. Penalty under section 271AAA is leviable on the undisclosed income detected during the search. In this case penalty has been levied on the addition made by the AO in the assessment order. This addition has been made by the AO on estimated basis depending upon the bank account credits of the assessee. The estimation of Rs.4 crores per month by the AO has no bearing to the search proceeding, For the period 01,09.2008 to 26.02.2009, the primary records showed receipts of Rs.38,78,32,431. This figure has not been disturbed by the assessing officer He made an addition of Rs-24 crores to the receipts of the assessee which resulted in a net addition to the income of the assessee to the tune of Rs.18,61,16,947/-. Ultimately penalty has been levied by the assessing officer on the income estimated and added by him. Therefore penalty if any on such addition can be levied only under section 271(1)(c) and not under 271AAA. For any specified year it is possible to levy penalties both under 271AAA and 271(1){c}, the first on the undisclosed income detected during the search and the second for any regular income/additions made by the AO. In this case penalty has been levied on the income estimated and added by the AO which has no bearing to the search. Therefore the AO has rightly levied penalty under section 271(1X0- This plea of the learned counsel is rejected.

6.6 The second plea of the learned counsel is that the assessing officer has not specified the limb of the section under which penalty has been levied. This appears to be a mere allegation as it could be seen from the assessment order that the assessing officer has initiated penalty under section 271(1)(c) for concealment of income and for furnishing of inaccurate particulars of income- Both the limbs have been mentioned and as could be seen from the penalty order, penalty has been levied for both the limbs. Nothing in law bars the assessing officer to initiate for both the limbs and levy for both the limbs. It has been held by the Hon'ble Karnataka High Court in the case of CIT vs Manjunatha Cotton and ginning factory 359 ITR 565 that penalty cannot be levied for one limb when it is initiated for the other limb. In this case it has been initiated for both the limbs and the assessee was very well aware of the same as the assessment order clearly speaks of it. The assessee has been given adequate opportunity to defend his case. During the course of penalty proceedings, the AO has issued show cause notice to the assessee but the assessee failed to file any response, In the absence of any reply from the assessee, the AO levied penalty under section 271(1)(c) for concealment of particulars as well as furnishing of inaccurate particulars of income. This plea of the learned counsel is also rejected.

6.7 The third plea taken by the learned counsel is that on merits also the penalty cannot be sustained as it has been levied on the basis of an income which has been estimated- The learned counsel argued that the basic reasoning of bank deposit as well as statement recorded under section 132(4), on the basis of which the penalty was levied, has been quashed by the Tribunal. The Tribunal preferred to estimate certain incomes on ad hoc basis of expenditure and confirmed an addition of Rs.28,70,000/-per month, Here again, the learned counsel has taken two arguments, one that no penalty can be levied when additions are made on estimations and two when the moot basis on which the penalty was levied was quashed in appeal, the penalty doesn't survive. For this argument he placed reliance on the judgment of the jurisdictional High Court in the case of Indermal Manaji vide 1TR number 10/2001 dated 6.07.2017. It is true that the addition has been made on the basis of estimation but in this case there is no other way to arrive at the income of the assessee for the period for which no record has been found. However the basis on which estimation is made, which is the bank account credits and the records found for the remaining part of the year is on sound footing. Moreover, the estimation to the tune of Rs. 1,72,20,000/- has been confirmed by both the appellate authorities. Therefore, it is clear that the assessee has concealed income to the tune of Rs. 1,72,20,000/- and made himself liable for penalty under section 271(1)(c). Moreover, the assessee's conduct in the whole scenario, which is destroying the primary records, not maintaining books of account and not declaring the correct receipts, itself calls for imposition of penalty. Regarding the second argument, that the ITAT has quashed the basis for estimation the learned counsel relied upon the judgment in the case of Indermal Manaji. However a perusal of the said judgment shows that the facts are completely different from the instant case. In the case of

Indermal Manaji, the assessing officer held that the assessee was not in the business of draft discounting whereas the Hon'ble ITAT upheld the contention of the assessee that he carries on the business of draft discounting. There was a difference in the very fundamental principle about the business of the assessee. The additions were made by the AO treating that the assessee is not in the business of draft discounting whereas the Hon'ble ITAT has reversed this decision. In the case of our assessee there is no such conflict. There is no even a conflict in the fact that income has to be estimated, the only difference is the amount of income and how it is to be estimated. While the assessing officer estimated the addition at Rs, 18,61,61,947/- the Hon'ble ITAT estimated the addition at Rs,1,72,20,000/-. So the ratio of the judgment in the case of Indermal Manaji is not applicable to the instant case.

6.8 Coming to the quantum of penalty, the assessing officer has levied a penalty of Rs.4,43,49,149/- on a concealed income of Rs. 13,04,77,050/-. This concealed income has been reduced to Rs.1,72,20,000/- by the Hon'ble ITAT. The assessing officer is therefore directed to reduce the penalty accordingly. This means the penalty on the differential amount of rupees Rs.11,32,57,050 (13,04,77,050 - 1,72,20,000) is deleted. This ground of appeal is PARTLY ALLOWED.

8. The Ld. AR for the assessee, at the time of hearing submitted that penalty levied by the Ld. AO u/s 271(1)(c) of the I.T.Act, 1961 is illegal and *void ab-initio*, because the Ld. AO has not recorded satisfaction, as required under the law before initiation of penalty proceedings, which is evident from the fact that the Ld. AO has issued show cause notice u/s 274 r.w.s. 271(1)(c) of the Act, without striking of inapplicable part of show cause notice. The Ld. AR, further submitted that the penalty levied by the Ld. AO u/s 271(1)(c) is illegal and *void ab-initio*, and the Ld. AO has levied penalty u/s 271(1)(c) of the Act, in spite of the fact that penalty provision of section 271(1)(c) of the Act, are not applicable, in a cases where search is conducted u/s 132 and the assessment year involved is a specified assessment year and in such situations penalty, if at all is leviable, it can be leviable under the provision of section 271AAA of the I.T.Act, 1961. The Ld. AR, further submitted that without prejudice to the above legal arguments, the penalty levied by the Ld.

AO u/s 271(1)(c) of the Act, on merits is also cannot be sustained under the Act, because the Ld. AO has levied penalty on estimated additions made in assessment proceedings, which has been finally reduced by the appellate authorities, that too on estimation basis. Therefore, in these facts, it cannot be considered that the assessee case is hit by the provision of section 271(1)(c) of the I.T.Act, 1961. In this regard, he has relied upon the following judicial precedents.

- 1. Copy of ITAT order passed in the appellant's case for AY 2009-10 vide ITA No.3247/Mum/2014, dated 10.11.2017*
- 2. Copy of judgment of Hon'ble Delhi Tribunal in the case of Ashwani Kumar Arora vs ACIT reported in 81 taxmann.com 440.*

9. The Ld. DR, on the other hand, submitted that the Ld.CIT(A) was erred in limiting the penalty u/s 271(1)(c) of the Act, to Rs. 58,46,280/- from Rs. 4,43,49,149/-, stating that the concealed income, as per assessment order was reduced by the ITAT from Rs. 18,61,16,947/- to Rs. 1,72,20,000/-, without appreciating the fact that the department has not accepted the order of the Tribunal and further, appeal has been filed before the Hon'ble High Court and the said appeal is pending for adjudication. The Ld. DR, further submitted that insofar as, legal arguments taken by the assessee challenging validity of penalty proceedings, in light of show cause notice issued by the Ld. AO u/s 274 r.w.s 271(1)(c) of the Act, is incorrect, because, the Ld. AO has arrived at clear satisfaction in the assessment proceedings before initiation of penalty proceedings u/s 271(1)(c) of the I.T.Act, 1961. Insofar as, another arguments of the assessee that penalty can be levied u/s 271AAA, but not under section 271(1)(c) of the I.T.Act, 1961, he submitted that though, there is no dispute with regard to the law applicable in the cases,

where searches conducted u/s 132, penalty can be levied u/s 271AAA, but facts of the present case are entirely different, because addition in this case has been made on the basis of estimation of income, where penalty, if any can be levied it can be levied only u/s 271(1)(c), but not u/s 271AAA of the I.T.Act, 1961.

10. We have heard both the parties, perused the material available on record and gone through orders of the authorities below. Insofar as, first arguments of the assessee that penalty proceedings initiated u/s 271(1)(c) of the Act, consequent to show cause notice issued u/s 274 r.w.s. 271(1)(c) of the Act is illegal and *void ab-initio*, we find that the Ld. AO has recorded clear satisfaction as required under the law during the course of assessment proceedings, before initiate penalty proceedings u/s 271(1)(c). Therefore, we are of the considered view that there is no merit in legal arguments taken by the assessee and accordingly, ground No.1 of assessee appeal is rejected. Insofar as, the second legal arguments of the assessee that penalty levied u/s 271(1)(c), is illegal and *void ab-intio*, because penalty, if any is leviable in a cases, where search is conducted u/s 132, then it can be levied only u/s 271AAA of the Act, but not u/s 271(1)(c), we find that as per the provisions of section 271AAA of the Act, where search action has been conducted on or after 01/06/2007, penalty for concealment of income or furnishing of inaccurate particulars of income can be levied u/s 271AAA, if the assessment year involved is a specified previous year. As per the said provisions, the Ld. AO may, notwithstanding anything contained in any other provisions of this Act, direct that in a case, where search has been initiated u/s 132 on or after the first day of June, 2007, before the first day of July 2012, the assessee shall pay by way of

penalty in addition to tax, if any payable by him, a sum computed @10% of the undisclosed income of the specified previous year. The term 'undisclosed' income has been defined, as per which any income of the specified previous year represented, either wholly or partly, by any money, bullion, jewelry or other valuable article or things or any entry in the books of account or other documents found in the course of search u/s 132, which has not been recorded on or before the date of search in the books of accounts or other documents maintained in the normal course relating search previous year. The terms 'specified previous year' has been defined, which means the previous year, which has ended before the date of search, and the date of filing the return of income under sub-section (1) of section 139 for search year has not expired before the date of search and the assessee has not furnished return of income for the previous year, before the said date or in which search was conducted. In this case, the search was conducted on 28/02/2009, which comes within the relevant assessment year 2009-10. The addition made in assessment proceedings is consequent to search proceedings conducted u/s 132 and on the basis of incriminating material found during the course of search. Thus, two requirements of the provisions of section 271AAA i.e, the 'undisclosed income' and 'specified previous year' are fulfilled. Therefore, we are of the considered view that penalty, if at all is leviable, it can be levied only u/s 271AAA of the I.T.Act, 1961, but not u/s 271(1)(c) of the I.T.Act, 1961. Insofar as, the arguments of the Ld. DR that although, provision of section 271AAA is applicable for specified previous year, but additions made in the assessment is on estimation basis, and therefore, the conditions prescribed u/s 271AAA are not fulfilled in order to levy penalty under said section is incorrect, because

whether addition is made on estimation basis or on the basis of certain evidences, fact remains that the additions made in the assessment is pursuant to search conducted u/s 132 and such income is on the basis of incriminating material found, as a result of search. Therefore, we are of the considered view that the additions made in the assessment proceedings, is towards undisclosed income of a specified year and hence, penalty if at all is leviable, it can be levied only u/s 271AAA of the Act, but not under section 271(1)(c) of the I.T.Act, 1961. This proposition is supported by the decision of ITAT, Delhi bench, in the case of Aswani Kumar Arora vs ACIT (2016) 50 ITR 337 Delhi Tribunal, where it was held that assessee during search and seizure proceedings, had admitted certain undisclosed income, penalty if any should be levied u/s 271AAA and not u/s 271(1)(c) of the I.T.Act, 1961. The ITAT Ahmadabad Bench, in the case of Dr. Naman A. Shastria vs ACIT (2015) 155 ITD 1003 held that provisions of section 271AAA and 271(1)(c) are mutually exclusive and thus, once penalty initiated u/s 271AAA for specified previous year, there cannot be any occasion to impose penalty u/s 271(1)(c) of the I.T.Act, 1961.

11. In this view of the matter and considering the facts and circumstances of this case, we are of the considered view that the Ld. AO was erred in levying penalty u/s 271(1)(c) of the I.T.Act, 1961, in a cases, where the assessment has been completed for a specified previous year and addition has been made towards undisclosed income unearthed during the course of search conducted u/s 132 of the I.T.Act, 1961. Hence, we are of the considered view that penalty levied by the Ld. AO u/s 271(1)(c)

cannot be sustained under the law and hence, we direct the Ld. AO to delete penalty levied u/s 271(1)(c) of the I.T.Act, 1961.

12. Coming back to the issue on merits. The Ld. AO has made additions towards undisclosed income on account of cash deposits in undisclosed bank account towards professional receipts for the relevant year, on the basis of incriminating material found during the course of search. Further, during the course of search a rough cash book maintained by the assessee, for according professional receipts received in cash was found for a period of part of the year. On the basis of said incriminating material, the income for the remaining period has been estimated by the Ld. AO towards undisclosed income on account of unexplained cash deposits in bank account. Although, the additions made by the Ld. AO was finally sustained by the ITAT to the extent of Rs. 1,72,20,000/-, but such addition is only on estimation basis that too on the basis of expenditure incurred by the assessee in cash for household expenses, ceremonial expenses etc. Therefore, we are of the considered view that when, addition is made on estimation basis that too on the basis of material found during the course of search for part of the period, then levying penalty u/s 271(1)(c) of the I.T.Act, 1961, on such estimated addition is incorrect. The Ld. AO has made additions towards undisclosed cash deposits in bank account without establishing fully that assessee has deposited cash into bank account for the remaining period of the financial year. Further, although, the Tribunal has finally sustained additions to the extent of Rs 1,72,20,000/-, but said additions was sustained on the basis of estimation of household expenses, ceremonial expenses etc. From the above, it is very clear that the Ld. AO has not made out a clear

case of concealment of particulars of income or furnishing inaccurate particulars of income, which warrants levy of penalty u/s 271(1)(c) of the I.T.Act, 1961. Therefore, we are of the considered view that the Ld. AO was incorrect in levying penalty u/s 271(1)(c), in respect of additions made towards undisclosed income on the basis of estimation. Although, the Ld.CIT(A) has deleted additions made by the Ld. AO to the extent of penalty levied on additions deleted by the ITAT, but, sustained penalty levied, in respect of additions confirmed by the ITAT, without appreciating the fact that the provisions of section 271(1)(c) of the I.T.Act, 1961, cannot be invoked, where the additions was made on estimation basis. Hence, we are of the considered view that on this ground also penalty levied by the Ld. AO u/s 271(1)(c) of the I.T.Act, 1961 cannot be sustained and accordingly, we direct the Ld. AO to delete penalty levied u/s 271(1)(c) of the I.T.Act, 1961.

13. In the result, appeal filed by the assesee is allowed and appeal filed by the revenue is dismissed.

Order pronounced in the open court on this 10 /02/2020

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Sd/-
(G. MANJUNATHA)
ACCOUNTANT MEMBER

Mumbai; Dated: 10/02/2020

Thirumalesh Sr.PS

Copy of the Order forwarded to :

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

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai