

**IN THE INCOME TAX APPELLATE TRIBUNAL "G", BENCH MUMBAI
BEFORE SHRI G. MANJUNATHA, ACCOUNTANT MEMBER
&
SHRI RAVISH SOOD, JUDICIAL MEMBER**

**ITA No.764/Mum/2019
(Assessment Year: 2009-10)**

Way Floors & Fabrics 171/2, Prem Kunj Jain Society Sion (West) Mumbai-400 002	Vs.	ITO-26(3)(5) Room No.504, C-11, 5 th Floor, Pratyakshakar Bhawan, BKC Bandra(E) Mumbai-400 051
PAN/GIR No.AAAF6813F		
Appellant)	..	Respondent)

Assessee by	Shri Jitendra Singh, AR
Revenue by	Shri V.Vinod Kumar, DR
Date of Hearing	02/03/2020
Date of Pronouncement	06 /03/2020

आदेश / O R D E R

PER G.MANJUNATHA (A.M):

This appeal filed by the assessee is directed against, the order of the Ld. Commissioner of Income Tax (Appeals)-38, Mumbai, dated 10/09/2018 and it pertains to Assessment Year 2009-10.

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

1. *The Ld. Commissioner of Income Tax (Appeals) - 38, Mumbai [hereinafter referred to as the "Ld. CIT(A)"] erred in passing the order dated 10.09.2018 upholding the order passed by Income Tax Officer, Ward - 26(3)(5), Mumbai [hereinafter referred to as 'Ld. A.O.'] levying concealment penalty of Rs.2,10,000/- without appreciating the facts and circumstances of the case. Thus, the order dated 10.09.2018 passed by Ld. CIT(A) is bad in law and the same may be quashed.*

2. **Notice issued under section 271(1)(c) of the Act without recording any satisfaction is bad in law**

i. The penalty notice dated 25.03.2015 issued under section 274 r.w.s 271 of the Income **Tax** Act, 1961 [hereinafter referred to as "the Act"] is void ab initio as the same is not discernable whether the penalty proceedings are **initiated for** concealment of income or furnishing of inaccurate particulars of income. Hence, **the notice** issued under section 274 r.w.s 271 of the Act and the subsequent penalty order passed under section 271(1)(c) of the Act are bad in law and the same may be quashed.

ii. The penalty order dated 22.09.2015 passed under section 271(1)(c) **of the Act** is bad in law as the penalty has been levied on the basis of both the limbs which is not permissible as per the provisions of section 271(1)(c) of the Act. Thus, the penalty order passed under section 271 (1)(c) of the Act is bad in law and the same may be deleted.

3. Levy of concealment penalty on ad-hoc addition made on account of non genuine purchases unjustified .

i. The Ld. CIT(A) erred in confirming the action of the A.O. in levying concealment penalty on the ad-hoc disallowance of Rs.4,44,885/- being 12.5% of purchases made from 5 parties by treating the same as non genuine relying on the investigation carried on by the Sales Tax Department without appreciating the fact and circumstances of the case. The Appellant, therefore, prays that levy of concealment penalty under section 271(1)(c) of the Act is not at all justified and the same may be deleted.

ii. The Ld. CIT(A) failed to appreciate the Appellant has furnished all relevant evidences in its possession to prove the genuineness of purchase. However, the disallowance was made on the basis of certain material collected at the back of Appellant which has not been furnished to the Appellant for rebuttal. The Appellant, has also been denied an opportunity to cross examine the department's witness. Thus, the levy of concealment penalty on the ad-hoc disallowance of purchases treating the same as non genuine is unjustified and the same may be deleted.

4. Levy of concealment penalty on disallowance made under section 43B unjustified

i. The Ld. CIT(A) erred in confirming the action of Ld. A. O. in levying penalty on the disallowance of Rs.2,20,055/- invoking the provisions of section 43B of the Act without appreciating the facts and circumstances of the case. The Appellant, therefore, prays that levy of concealment penalty on the disallowance of Rs.2,20,055/- under section 43B is not at all justified and the same may be deleted.

ii. The Ld. CIT(A) failed to appreciate that the service tax was not paid to the Government Treasury, as the Appellant has not received the same from its clients. Hence, the disallowance of Rs.2,20,055/- under section 43B of the Act is unjustified. The Appellant, therefore, prays that the levy

of concealment penalty on the above disallowance is not at all justified and the same may be deleted.

5. The Appellant craves leave to add, alter, amend, delete or rescind any of the above grounds of appeal mentioned hereinabove.

3. The brief facts of the case are that the assessee is engaged in the business of dealers in fabrics and carpet, filed its return of income for AY 2009-10 on 02/09/2009, declaring total income of Rs.12,68,790/-. The assessment has been, subsequently reopened u/s 147 of the I.T.Act, 1961 and the assessment has been completed u/s 143(3) r.w.s. 147 of the I.T.Act, 1961 on 25/03/2015, determining the total income at Rs.20,44,290/- by making additions towards 12.5% profit on alleged bogus purchases from Hawala/suspicious dealers and disallowances of service tax payable u/s 43B of the I.T.Act, 1961. Thereafter, a show cause notice u/s 274 r.w.s. 271(1)(c) of the I.T.Act, 1961, dated 25/03/2015 has been issued and called upon the assessee to explain as to why, penalty shall not be levied for concealment of particulars of income and for furnishing inaccurate particulars of income. In response, the assessee vide letter, dated 06/05/2015 submitted that it has neither, furnished inaccurate particulars of income, nor concealed particulars of income and additions made towards alleged bogus purchases is on estimation basis and also, the addition on account of disallowances u/s 43B of the I.T.Act, 1961, it has furnished necessary evidences, including details of payment. Therefore, it cannot be said that it has deliberately concealed particulars of income, so as to evade payment of taxes. The Ld. AO after considering relevant submissions of the assessee and also taken note of fact that the assessee has furnished inaccurate particulars of

income, thereby concealed particulars of income levied penalty of Rs.2,10,000/-, which is equal to 100% of tax sought to be evaded.

4. Aggrieved by the penalty order, the assessee preferred an appeal before the Ld.CIT(A). Before the Ld.CIT(A), the assessee has reiterated its submissions made before the Ld. AO and argued that there is no deliberate attempt to evade payment of taxes, in respect of additions made towards alleged bogus purchases, as well as disallowances of unpaid liability u/s 43B of the I.T.Act, 1961. The Ld.CIT(A) after considering relevant submissions of the assessee and also by relied upon certain judicial precedents, including the decision of Hon'ble Kerala High Court, in the case of CIT vs. K.P.Madhusudanan (2001) 165 CTR 353 observed that the assessee has failed to prove that explanation put forth is bonafide and that all the facts relating to the same and material to the computation of his total income have been disclosed in the return of income so filed. Therefore, he opined that it is a fit case for imposing penalty u/s 271(1)(c) of the I.T.Act, 1961 and accordingly, affirmed penalty levied by the Ld. AO and dismissed, appeal filed by the assessee. Aggrieved by the Ld.CIT(A) order, the assessee is in appeal before us.

5. The Ld. AR for the assessee submitted that the Ld.CIT(A) has erred in confirmed penalty levied u/s 271(1)(c) of the I.T.Act, 1961, without appreciating the fact that the Ld. AO has not recorded any satisfaction, as required under law before initiation of penalty proceedings, under which limb, the proposed penalty proceedings was initiated, which is evident from the fact that the Ld. AO has initiated penalty proceedings for concealment of particulars of

income and for furnishing inaccurate particulars of income. In this regard, he relied upon the decision of ITAT, Mumbai 'D' bench in the case of Madhav N. Bhatkuly vs ACIT in ITA.No.7224/Mum/2018.

6. The Ld. DR, on the other hand strongly supporting order of the Ld.CIT(A) submitted that there is no merit in arguments advanced by the Ld. AR for the assessee, because the Ld. AO has recorded clear satisfaction, as required under law, which is evident from the fact that he has clearly mentioned in his assessment order about, limb under which the proposed penalty proceedings was initiated. The Ld.CIT(A) after appreciating proper facts has rightly confirmed penalty levied by the Ld. AO and his order should be upheld.

7. We have heard both the parties, perused the material available on record and gone through orders of the authorities below. We find that an identical issue has been considered by the co-ordinate bench of ITAT, Mumbai 'D' bench in the case of Madhav N. Bhatkuly vs ACIT in ITA No.7224/Mum/2018, where under identical set of facts, the Tribunal by following various judicial precedents, including the decision of Hon'ble Supreme Court, in the case of CIT vs M/s. SSA's Emerald Meadows (2016) 242 taxmann.com 180 (SC), held that from the notice issued by the Ld. AO u/s 274 r.w.s. 271(1)(c) of the I.T.Act, 1961 and from the satisfaction recorded during the assessment proceedings, it is not discernable from the records that whether, the penalty proceedings are initiated for concealment of particulars of income or for furnishing inaccurate particulars of income and consequently, the whole penalty proceedings becomes *void ab initio* and liable to be quashed. The relevant findings of the Tribunal are as under:-

“6. We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. It is an admitted position of law that before initiation of penalty proceedings u/s 271(1)(c), the Ld. AO shall arrive at a clear satisfaction as to whether, such penalty proceedings are being initiated for concealment of particulars of income or for furnishing inaccurate particulars of income. If, the Ld. AO has not records clear satisfaction as required under the law, either in assessment proceedings or at the time of issuing show cause notice u/s 274 r.w. 271(1)(c), then the whole penalty proceedings, consequent to incorrect satisfaction or for non satisfaction becomes void ab-initio Further, it is also a settled position of law that the Ld. AO has to categorically specify the limb under which, the penalty proceedings has been initiated. If penalty proceedings, is initiated for one limb and levied for different limb, then the whole penalty proceedings, becomes invalid and void ab-initio. This legal proposition is supported by the decision of Hon’ble e Bombay High Court, in the case of CIT vs Samson Perinchery in ITA No. 1154/Mum/2015, dated 05/12/2017. This legal proposition is further supported by the decision of Hon’ble Supreme court, in the case of CIT vs M/s SSA’s Emerald Meadows (2016) 242 Taxmann 180 (SC), where the Hon’ble Supreme court has upheld the decision of Hon’ble Karnataka High Court, in the case of CIT vs. Manjunatha cotton & Ginning Factory (2013) 359 ITR 565. In this case, on perusal of assessment order, as well as penalty order , it is very clear from the records that the Ld. AO has not arrived at clear satisfaction as required under the Act, even in assessment order and said lapses is continued in show cause notice issued us 274 r.w.s. 271(1)(c) of the I.T.Act, 1961. Further, even in penalty order, the Ld. AO has not arrived at clear satisfaction, which is evident from the fact that he has concluded his penalty proceedings and levied penalty u/s 271(1)(c) on both limbs. From the above, it is very clear that the satisfaction required to be recorded before initiation of penalty proceedings u/s 271(1)(c) is not discernable, whether the penalty proceedings are initiated for concealment of particulars of income or furnishing of inaccurate particulars of income, either in assessment order or in the show cause notice issued for levying penalty. Therefore, we are of the considered view that the penalty proceedings initiated u/s 271(1)(c) of the Act, consequent to vague notice is void ab initio and liable to be quashed. Therefore, we direct the Ld. AO to delete penalty imposed u /s 271(1)(c) of the I.T.Act, 1961.”

8. In this case, on perusal of facts, we find that the Ld. AO has initiated penalty proceedings u/s 271(1)(c) of the I.T.Act, 1961, for both limbs, i.e, for concealment of particulars of income and for furnishing inaccurate particulars of income. The said lapses continued in show cause notice issued u/s 274 r.w.s. 271(1)(c) of

the I.T.Act, 1961, where the Ld. AO has issued printed notice without striking of inapplicable part of notice. From the above, it is very clear that the Ld. AO has not arrived at clear satisfaction, as required under law before initiation of penalty proceedings u/s 271(1)(c) of the I.T.Act, 1961, whether said penalty proceedings has been initiated for furnishing inaccurate particulars of income or for concealment of particulars of income. Therefore, we are of the considered view that the whole penalty proceedings consequent to vague or invalid notice is *void ab initio* and liable to be quashed and hence, we quashed penalty order passed by the Ld. AO u/s 271(1)(c) of the I.T.Act, 1961,.

9. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on this 06 /03/2020

Sd/-
(RAVISH SOOD)
JUDICIAL MEMBER

Sd/-
(G. MANJUNATHA)
ACCOUNTANT MEMBER

Mumbai; Dated 06/03/2020
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.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai