IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : B : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI AMIT SHUKLA, JUDICIAL MEMBER

ITA No.3915/Del/2016
Assessment Year: 2011-12

C.S. Datamation Research Services Pvt. Ltd., B-12, Swashtya Vihar, New Delhi.	Vs	ITO, Ward-3(4), New Delhi.

PAN: AACCC6969K

(Appellant) (Respondent)

Assessee by	:	Shri Salil Kapoor, Advocate
Revenue by	:	Shri Jagdish Singh, Sr. DR
Date of Hearing	:	27.05.2020
Date of Pronouncement	:	15.06.2020

ORDER

PER R.K. PANDA, AM:

This appeal filed by the assessee is directed against the order dated 9th March, 2016 of the CIT(A)-2, New Delhi, relating to assessment years 2011-12.

2. Levy of penalty of Rs.48,36,979/- by the AO u/s 271(1)(c) of the IT Act which has been upheld by the CIT(A) is the only issue raised by the assessee in the grounds of appeal.

3. Facts of the case, in brief, are that the assessee is a company engaged in the business of manpower supply and operational support. It filed its return of income on 24th March, 2012 declaring an income of Rs.33,89,810/-. The AO, on examination of the balance sheet, noted that the assessee has claimed other liabilities at Rs.4,61,10,276/- under the head ócurrent liabilities.ô On being asked by the AO to furnish the complete details of such óother liabilitiesô the assessee subsequently filed a revised computation of income wherein it included an amount of Rs.1,45,61,540/- being amount disallowable u/s 43B of the IT Act due to non-payment of service tax. The AO noted from the tax audit report that there is clear mention of this amount as having not been paid within the stipulated time period and disallowable u/s 43B of the Act. Since the tax audit report was not furnished along with the return of income, the AO held that it was a deliberate attempt on the part of the assessee to suppress the amount. The AO, thereafter, completed the assessment at a total income of Rs.1,79,51,350/- wherein he made an addition of Rs.1,45,61,540/- being the service tax disallowable u/s 43B of the IT Act.

4. The assessee did not prefer any appeal against the order of the AO. Subsequently, the AO initiated penalty proceedings u/s 271(1)(c) of the IT Act. Rejecting the various explanations given by the assessee and observing that the assessee has concealed its particulars of income and furnished inaccurate particulars, levied penalty of Rs.48,36,979/- being 100% of the tax sought to be

evaded u/s 271(1)(c) of the IT Act, 1961. In appeal, the ld.CIT(A) upheld the penalty so levied by the AO.

5. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal.

6. The ld. Counsel for the assessee, at the outset, referred to a copy of notice issued u/s 274 r.w. section 271 of the IT Act dated 24th March, 2014, which is placed at page 6 of the paper book. Referring to the said notice, he submitted that the inappropriate words in the said notice have not been struck off by the AO. Therefore, it is not understood as to under which limb of the provisions of section 271(1)(c) of the IT Act the AO has levied the penalty. Since the said show cause notice issued u/s 274 of the Act did not specify the charge against the assessee as to whether it is for concealing the particulars of income or for furnishing inaccurate particulars of income, therefore, the penalty order passed u/s 271(1)(c) of the IT Act in pursuance of the said notice deserves to be set aside. For the above proposition, the ld. Counsel referred to the following decisions:-

i) CIT v. Manjunatha Cotton & Ginning Factory 359 ITR 565;

ii) CIT v. SSAâS Emerald Meadows [2016] 73 taxmann.com 241 (Kar);

iii) CIT v. Samson Perinchery 392 ITR 4 (Bombay);

iv) PCIT v. Sahara India Life Insurance Co. Ltd. [ITA No. 475 of 2019];

v) Manu Bali v. ACIT [ITA/790/DEL/2016; decision dated 05.10.2017];

vi) Vijay Agarwal v. DCIT [ITA/5432/DEL/2016; decision dated 05.11.2019];

vii) Sanjay Mittra vs. DCIT [ITA No.5206/Del/2016, order dated 01.10.2018];

viii) DCIT vs. Gellette Diversified Operations Pvt. Ltd. [ITA No.4585/Del/2015] and vice versa [ITA No.3238/Del/2015], order dated 25th April, 2019 for A.Y. 2011-12.

7. So far as the merit of the case is concerned, the ld. Counsel for the assessee submitted that the Hon'ble Delhi High Court in the case of CIT vs. Noble & Hewitt (I) (P) Ltd. reported in 305 ITR 324, has held that when the assessee did not deposit part of service tax collections with concerned authorities and has neither claimed any deduction in this regard nor did it debit the said amount as an expenditure in the Profit & Loss Account, no disallowance u/s 43B can be made. He also relied on the decision of Chennai Bench of the Tribunal in the case of ACIT vs. Real Image Media Technologies (P) Ltd. reported in 116 TTJ 964 and the decision of the Delhi Bench of the Tribunal in the case Tristar Intech (P) Ltd. vs. ACIT, ITA No.1457/Del/2010, order dated 7th September, 2015 wherein similar view has been taken by the Tribunal. Referring to the audited financials of the assessee for the impugned assessment year, he submitted that the assessee has not claimed such service tax as a deduction in the Profit & Loss Account. He accordingly submitted that in view of the decisions cited (supra), penalty is not

leviable u/s 271(1)(c) of the IT Act when the disallowance u/s 43B should not have been made.

8. He submitted that the ld.CIT(A) in assesseeôs own case for subsequent assessment year, i.e., A.Y. 2012-13, has deleted the addition made u/s 43B on account of non-payment of service tax liability, even though the assessee itself had added it back to its income while filing the revised computation of income. The ld.CIT(A) in the said order has deleted the addition on unpaid service tax amounting to Rs.94,68,278/- and allowed the ground raised by the assessee. He submitted that the Revenue has not filed any appeal against the order of the Tribunal.

9. Referring to the copy of the assessment order, the ld. Counsel further submitted that there is no satisfaction recorded in the assessment order, therefore, the penalty could not have been levied by the AO u/s 271(1)(c) of the IT Act. Referring to the decision of the Delhi Bench of the Tribunal in the case of Tristar Intech (P) Ltd. vs. ACIT, ITA No.1457/Del/2010, order dated 7th September, 2015 he submitted that the Tribunal in the said decision has held that Explanation-1 cannot be applied in a case where the assessee furnishes inaccurate particulars of income. Since the AO, in the instant case has invoked clause (a) and (b) of Explanation-1 to section 271(1)(c) of the IT Act while levying the penalty u/s 271(1)(c) of the IT Act, therefore, the same is also not sustainable. He accordingly

submitted that on all counts penalty levied by the AO and sustained by the CIT(A) is not in accordance with the law and, hence, should be deleted.

10. The ld. DR, on the other hand, heavily relied on the order of the CIT(A). He submitted that the assessee is a habitual defaulter in submitting its e-returns since the returns were always filed beyond the due date. The assessee never bothered even to respond to the show cause notices/questionnaires issued by the AO. The tax audit report was never filed along with the return of income and were never furnished before the AO. during the course of assessment proceedings, deliberately and intentionally, fully knowing that the assessment proceedings are going to be barred by limitation. Since the assessee company is not a small company and doing business with private parties and Government departments, therefore, it also cannot be said that it was not properly advised. So far as the argument of the ld. Counsel for the assessee that the inappropriate words are not struck off from the notice, he submitted that the Hon'ble Madras High Court in the case of Sundaram Finance Ltd. vs. CIT (2018) 403 ITR 407 (Mad) has held that where notice did not show nature of default, it was a question of fact. The assessee had understood the purport and import of notice, and hence, no prejudice was caused to the assessee. While doing so, the Hon'ble High Court has considered the decision of the Hon'ble Karnataka High Court in the case CIT v. Manjunatha Cotton & Ginning Factory [2013] 359 ITR 565 (Kar.). Referring to the decision of the Hon'ble Bombay High Court in the case of CIT vs. Smt. Kaushalya (1994) 216 ITR 660

(Bom), he submitted that the Hon'ble High Court in the said decision has held that mere mistake in language used or mere non-striking off of inaccurate portion cannot by itself invalidate the notice under section 274. Accordingly penalty orders passed by the AO for different assessment years were held to be perfectly valid and there was no justification for quashing the same on the ground of absence of jurisdiction. He also relied on the following decisions:-

i) Trimurti Engineering Works vs. ITO (2012) 150 TTJ 195 (Del);

ii) Union of India vs. Dharmendra Textile Processors, 306 ITR 277 (SC);

iii) Chairman SEBI vs. Shri Ram Mutual Fund (2006) 68 SCL 216 (SC); &

iv) CIT vs. Zoom Communications P. Ltd. (2010) 327 ITR 510 (Del).

11. The ld. Counsel for the assessee in his rejoinder submitted that the Hon'ble Delhi High Court in the case of PCIT vs. Sahara India Life Insurance Company Ltd. has approved and followed the decision of the Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory (supra). So far as the decision of the Hon'ble Bombay High Court in the case of Smt. Kaushalya (supra) is concerned, he submitted that the Hon'ble High Court subsequently in the decision in the case CIT vs. Samson Perinchery (supra) has followed the decision of the Hon'ble Karnataka High Court and, therefore, the decisions relied on by the ld. DR cannot be accepted. Referring to the decision of the Delhi Bench of the Tribunal in the case of Sanjay Mittra vs. DCIT, ITA No.5206/Del/2016, he

submitted that the Tribunal has considered all the decisions relied on by the ld. DR in that case and held that all those decisions are of non-jurisdictional High Courts whereas the Delhi Bench of the Tribunal is bound by the decision of the Hon'ble Delhi High Court. Distinguishing the various decisions relied on by the ld. DR, he submitted that none of the decisions are applicable to the present case and are distinguishable and, therefore, the penalty levied by the AO and sustained by the CIT(A) should be cancelled.

12. We have considered the rival arguments made by both the sides and perused the material available on record. We have also considered the various decisions cited before us. We find, the AO, on the basis of the details furnished by the assessee during the course of assessment proceedings, made an addition of Rs.1,45,61,540/- u/s 43B of the IT Act being the unpaid liability towards service tax. The above liability was shown under the head "Current liabilities" in the balance sheet. The assessee did not prefer any appeal and thereafter penalty was levied u/s 271(1)(c) of the IT Act which has been upheld by the CIT(A). A perusal of the copy of the notice issued u/s 274 of the IT Act shows that the inappropriate words in the said notice has not been struck off. Even the last line of the said notice only speaks of section 271 and does not even mention section 271(1)(c) of the IT Act. We find, the Delhi Bench of the Tribunal in the case of Sanjay Mittra (supra) had considered an identical issue and following the decision of the Tribunal in the case of Sahiwal Investment & Trading Co. vs. ITO, vide ITA

No.4913/Del/2015 for A.Y. 2006-07, order dated 18.07.2018, has cancelled the penalty levied by the AO and sustained by the CIT(A) by observing as under:-

> ñ15. We have considered the rival arguments made by both the sides and perused the material available on record. We have also considered the various decisions cited before us. We find the only issue to be decided in the grounds of appeal is regarding the sustainable of penalty levied u/s 271(1)(c) when the inappropriate words in the notice issued u/s 274 r.w.s. 271 have not been struck off. A perusal of the notice issued u/s 274 r.w.s. 271 dated 31.03.2004 shows that the inappropriate words in the said notice have not been struck off and it is a printed notice. Even the last line of the said notice only speaks of section 271 and does not even mention of section 271(1)(c) of the I.T. Act. We find an identical issue had come up before this Bench of the Tribunal in the case of Sahiwal Investment & Trading co. vs. ITO vide ITA No.4913/Del/2015 for assessment year 2006-07 order dated 18.07.2018 to which both of us parties. We find the Tribunal in the said decision while allowing the additional ground filed by the assessee has decided the issue in favour of the assessee by observing as under :-
>
> > "12. Additional Ground No. (ii) is relating to absence of specific charge pointing out in the notice. It is pertinent to note here that the penalty order is based on furnishing of inaccurate particulars but the notice is not specifying exactly on which limb the penalty u/s 271(1)(c) has been initiated. From the notice dated 30.06.2013 produced by the Ld. AR during the hearing, it can be seen that the Assessing Officer was not sure under which limb of provisions of Section 271 of the Income Tax Act, 1961, the assessee is liable for penalty. The issue is squarely covered by the decision of the Hon'ble Supreme Court in case of M/s SSA' Emerald Meadows. The extract of the decision of the Hon'ble Karnataka High Court in M/s. SSA' Emerald Meadows are as under which was confirmed by the Hon'ble Apex Court:
> >
> > > "3. The Tribunal has allowed the appeal filed by the assessee holding the notice issued by the Assessing Officer under Section 274 read with Section 271(1)(c) of the Income Tax Act, 1961 (for short 'the Act') to be bad in law as it did not specify which limb of Section 271(1)(c) of the Act, the penalty proceedings had been initiated i.e., whether for concealment of particulars of income or furnishing of inaccurate particulars of income. The Tribunal, while allowing the appeal of the assessee, has relied on the ITA No. 4913/Del/2015 decision of the Division Bench of this Court rendered in the case of COMMISSIONER OF INCOME TAX -VS- MANJUNATHA COTTON AND GINNING FACTORY (2013) 359 ITR 565.

> 4. In our view, since the matter is covered by judgment of the Division Bench of this Court, we are of the opinion, no substantial question of law arises in this appeal for determination by this Court. The appeal is accordingly dismissed."
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> Thus, Additional Ground No. (ii) of the assessee's appeal is allowed. Since the inception of the notice issued u/s 271(1)(c) has become null and void, there is no need to comment on merit of the case. The Penalty u/s 271(1)(c) of the Act is quashed."

16. Since in the instant case also the inappropriate words in the penalty notice has not been struck off and the notice does not specify as to under which limb of the provisions, the penalty u/s 271(1)(c) has been initiated, therefore, we are of the considered opinion that the penalty levied u/s 271(1)(c) is not sustainable and has to be deleted. Although the ld. DR has relied on various decisions to the proposition that mere non-striking off of the inappropriate words will not invalidate the penalty proceedings, however, all these decisions are of non- jurisdictional High Court decisions. The decision of the Delhi Bench of the Tribunal relied on by the ld. DR is prior to the decision of the Hon'ble Karnataka High Court in the case of SSA'S Emerald Meadows (supra) where the SLP filed by the Revenue has been dismissed. Since there is no decision of the Jurisdictional High Court on this issue, therefore, we find merit in the argument of the ld. counsel for the assessee that if two views are available on a particular issue, the view which is favourable to the assessee has to be followed in the light of the decision of the Hon'ble Supreme Court in the case of Vegetable Products Limited (supra). We, therefore, set-aside the order of the ld. CIT(A) and direct the Assessing Officer to cancel the penalty so levied.ò

13. The Hon'ble Delhi High Court in the case of Sahara India Life Insurance Company Ltd. (supra), while deciding the issue of non-striking off of inappropriate words, has held as under:-

> ñ21. The Respondent had challenged the upholding of the penalty imposed under Section 271(1) (c) of the Act, which was accepted by the ITAT. It followed the decision of the Karnataka High Court in CIT v. Manjunatha Cotton & Ginning Factory 359 ITR 565 (Kar) and observed that the notice issued by the AO would be bad in law if it did not specify which limb of Section 271(1) (c) the penalty proceedings had been initiated under i.e. whether for concealment of particulars of income or for furnishing of inaccurate particulars of income. The Karnataka High Court had followed the above judgment in the subsequent order in Commissioner of Income Tax v. SSAôs Emerald Meadows (2016) 73 Taxman.com 241 (Kar), the appeal

against which was dismissed by the Supreme Court of India in SLP No. 11485 of 2016 by order dated 5th August, 2016.

22. On this issue again this Court is unable to find any error having been committed by the ITAT. No substantial question of law arises.ò

14. We, therefore, are of the opinion that the levy of penalty u/s 271(1)(c) is not valid in law in view of non-striking of the inappropriate words in the penalty notice.

15. Even on merits also we find, the Hon'ble Delhi High Court in the case of Noble & Hewitt (I) (P) Ltd. (supra) has held that where the assessee did not debit the amount to the P&L Account as an expenditure nor did the assessee claim any deduction in respect of the amount where the assessee was following mercantile system of accounting, the question of disallowing the deduction not claimed would not arise. We further find the ld.CIT(A) in assessee's own case for A.Y. 2012-13, deleted the addition of unpaid service tax amounting to Rs.94,68,278/- which was added back by the assessee in its revised computation of income. The relevant observation of the CIT(A) at para 3.2.3 of his order reads as under:-

ñ3.2.3. In view of the accounting treatment meted out by the appellant to service tax and also respectfully following the judgement of the Hon'ble Jurisdictional High Court, I am of the opinion that no addition to income u/s 43B was called for on account of unpaid service tax liability (since it was never claimed as an expenditure or deduction by the appellant) even though the appellant itself added it back to its income while filing revised computation of income. Under these circumstances, the addition of unpaid service tax amount Rs,94,68,278/-is hereby deleted and this ground of appeal stands allowed.ò

16. The ld. Counsel for the assessee also made a statement at the bar that the Revenue has not preferred any appeal against the order of the CIT(A) deleting the addition made by the AO on account of unpaid service tax liability although the assessee in its revised computation of income had added the same u/s 43B. Therefore, the issue as to addition u/s 43B on account of non-payment of service tax liability when the same has not been debited in the Profit & Loss Account nor claimed as an expenditure has become a debatable issue. It has been held in various decisions that penalty u/s 271(1)(c) of the IT Act, 1961 is not leviable on account of additions which are debatable issues. We, therefore, are of the opinion that penalty u/s 271(1)(c) of the IT Act, 1961 is not leviable on merit also.

17. In view of the above discussion, we are of the considered opinion that no penalty u/s 271(1)(c) of the Act is leviable. Therefore, we set aside the order of the CIT(A) and direct the AO to cancel the penalty so levied u/s 271(1)(c) of the IT Act, 1961.

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

The decision was pronounced in the open court on 15.06.2020.

Sd/-	Sd/-
(AMIT SHUKLA) JUDICIAL MEMBER	(R.K. PANDA) ACCOUNTANT MEMBER

Dated: 15th June, 2020.

dk

Copy forwarded to

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi