

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, "A" JAIPUR

श्री रमेश सी० शर्मा, लेखा सदस्य एवं श्री विजय पाल राव, न्यायिक सदस्य के समक्ष
BEFORE: SHRI RAMESH C. SHARMA, AM & SHRI VIJAY PAL RAO, JM

आयकर अपील सं./ITA No. 1316/JP/2019
निर्धारण वर्ष / Assessment Year : 2015-16

Shri Kanheya Lal 179, Ravaton Ka Mohalla, Ajmer.	बनाम Vs.	The ITO, Ward-1(3), Ajmer.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AFFPL 3307 R		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : None
राजस्व की ओर से / Revenue by : Miss Chanchal Meena (ACIT)

सुनवाई की तारीख / Date of Hearing : 16/07/2020
उदघोषणा की तारीख / Date of Pronouncement: 21/07/2020

आदेश / ORDER

PER: VIJAY PAL RAO, J.M.

This appeal by the assessee is directed against the order dated 20.08.2019 of Id. CIT(A), Ajmer arising from the penalty order passed U/s 271(1)(c) of the IT Act for the assessment year 2015-16. Due to prevailing COVID-19 pandemic condition the hearing of the appeal is concluded through video conference.

2. There is delay of 8 days in filing the present appeal. The assessee has filed an application for condonation of delay. Since, nobody has

appeared on behalf of the assessee though written submission has been filed, therefore, we considered the reasons explained in the application for condonation of delay as well as arguments of the Id. DR. The assessee has explained the reasons for delay of 8 days that due to festivals season in the month of September, 2019 and October, 2019 being Nevratri, Dussehra and Diwali and thereafter there were closed holiday on 2nd and 3rd November, 2019 being Saturday and Sunday the assessee could file the present appeal only on 11.11.2019. Thus, the assessee has prayed that the delay of 8 days in filing the appeal may be condoned. Having considered the reasons explained by the assessee as well as facts and circumstances of the case we are of the considered opinion that in the interest of justice the delay of 8 days in filing the present appeal be condoned so that the appeal of the assessee shall be decided on merits instead of technicalities. Accordingly the delay of 8 days in filing the present appeal is condoned.

3. The assessee has raised following grounds:-

- "1. Whether on the facts and circumstances of the case the Commissioner(appeal) upheld the ITO's order is correct.*
- 2. The body of the assessment order at page 7 penalty proceedings u/s 271(1)(c) of the I.T. Act are separately initiated for furnishing wrong particulars of the Income.*

- 3. Penalty proceedings u/s 271(1)(c) of the I.T. Act are separately initiated for concealment of the particulars of income.*
- 4. In the same assessment order AO is not ascertained that for which finding the penalty u/s 271(1)(c) is initiated.*
- 5. As per decision penalty concealment penalty-penalty cannot be levied for twin charges-levy of penalty not justified as furnishing of inaccurate particulars of income and concealment of particulars of income are two separate defaults and Assessing Officer at no stage specified under which limb penalty proceeding initiated- Aditya Chemicals Ltd. vs. Income Tax Officer (2018) 62 ITR 150 (Trib., Delhi).*
- 6. In this case the decision of honourable Supreme Court CIT vs. Reliance Petroproducts Ltd. reported at 322 ITR 158 is also applicable and other cases are also applicable.*
- 7. The CIT(A) has not considered the facts of the case. The AO has mentioned the "Short disclosed Purchases". It is mentioned here that the purchases are made from the turnover of the assessee and these are reflected in the transactions with the RSBCL. It is bonafide also."*

4. The assessee is engaged in the business of retail trading of liquor under the licence of Excise Department in the State of Rajasthan. During the course of assessment proceedings, the AO noted that as per the details shown in 26AS purchases for the year under consideration from the various State Government suppliers and district excise office is Rs. 2,07,40,326.37 on which tax collected at source of Rs. 2,15,276.85 whereas the assessee in the books of accounts has shown the purchases which is less to the tune of Rs. 6,05,536/-. The AO

accordingly made an addition of the said amount of Rs. 6,05,536/- as unexplained source of purchases. The said addition made by the AO has attained finality as the assessee has not challenged the said action of the AO. The AO initiated the penalty proceedings U/s 271(1)(c) of the Act by issuing notice U/s 274 of the Act on 26.12.2017. The AO levied of penalty of Rs. 1,89,169/- being 100% of the tax sought to be evaded in respect of the said addition of Rs. 6,05,536/-. The assessee challenged the levied of penalty U/s 271(1)(c) of the Act by filing the appeal before the Id. CIT(A) however, the Id. CIT(A) has confirmed the levy of penalty while passing the impugned order. The submissions made before the Id. CIT(A) as well before the tribunal are reproduced as under:-

"It is humbly requested that in this case the decision of The Honourable Supreme Court decision CIT vs. Vegetable Products Ltd. in 88 ITIZ 192 (SC) (CLC Page No. 120-124) DCIT vs. Ananda Marakala in 150 ITD 323 (Bang) "30 is applicable ----thus there are two views on the issue, one in favour of the assessee expressed by the Hon'ble Allahabad High Court and the other against the assessee expressed by the Hon'ble Gujarat & Calcutta High Courts. Admittedly, there is no decision rendered by the jurisdictional High Court on this issue. In the given circumstances, following the decision of the Hon'ble Supreme Court in the case of Vegetable Products Ltd. (supra), we hold that where two views are possible on an issue, the view in favour of the assessee has to be preferred.

Following the decision of the Hon'ble Allahabad High Court, we uphold the order of the CIT(A)."

Welgrow line (India) (P.) Ltd. vs. ACIT in 54 taxmarm.com 117 (Chennai) ACTT vs. M/s Eskay designs in ITA No. 1951/Mds/2012 A.Y. 2009-10 Jitendra Mansukhlal Shah vs. DOT in ITA No. 2293/Mum/2013 dated 4.3.2015.

Amritsar ITAT (third member) in the case of HPCL Mittal Energy Ltd. vs. ACIT ITA Nos. 554 &555/Asr/2014 held that The A.O. cannot initiate penalty on the charge of 'concealment of particulars of income', but ultimately find the assessee guilty in penalty order of 'furnishing inaccurate particulars of income' (and vice versa). In the same mariner, he cannot be uncertain in the penalty order as to concealment or furnishing of inaccurate particulars of income by using slash between the two expressions.

If the addition made by The A.O. but he has not disputed in the same in the Appeal such acceptance of addition does not mean concealment of income. It is held by The Honourable Supreme Court in case of Sir Shadilal Sugar Mills (168 ITR 705) --- Indeed there may be numerous reasons with the tax payer for not approaching the first appellate authority for justice.

Karnataka High Court in case of CIT vs. Manunathna Cotton & Ginning ITA No. 1307/Bang/2003/ [2013-ITR-HC-KAR-093] has held that even if the assessee has not challenged the order of assessment levying tax and interest and has paid the same, that by itself would not be sufficient for the authorities either to initiate penalty proceedings or impose penalty.

There is decision of Honourable Supreme Court in CIT vs. Reliance Petroproducts Pvt. Ltd. 322 ITR 158 (SC).

Kolkata ITAT Bench in the case of M/S. New Life Sonoscan Centre, vs ItO, Ward - 24(2)1TA No.2560/ KOL/ 2017 held that the show cause notice issued in the present case u/s 274 of the Act does not specify the charge against the assessee as to whether it is for concealing particulars of income or furnishing inaccurate particulars of income. The show cause notice u/s 274 of the Act does not strike out the inappropriate words. In these circumstances, we are of the view that imposition of penalty cannot be sustained."

Thus, it is clear that the assessee has challenged the levy of penalty only on the ground of validity of initiation of the penalty. Though the assessee has also referred some of the judgments on the point that merely because the addition is made by the AO does not lead to the conclusion that the assessee has furnished inaccurate particulars of income or concealed particulars of income.

5. On the other hand, Id. DR has submitted that it is a clear case of concealment particulars of income as the assessee has understated the purchases in the books of account which was detected by the AO from Form 26AS and the assessee has not disputed the correctness of the particulars of purchases as shown in form 26AS. Even the Assessing Officer has given the details of the purchases from the suppliers who are all statement government companies as well as Department. Therefore, there is no dispute regarding the fact that the assessee has understated purchases in the books of account and thereby the source

of unaccounted purchases has not been explained by the assessee. The Id. DR has further contended that as regards the validity of initiation of the proceedings the AO has recorded the satisfaction in the assessment order which cannot be a basis for challenging the initiation of the penalty proceedings Section 271(1B) provides that any amount is added or disallowance in the total income of the assessee and the assessment order contains a direction for initiation of proceedings U/s 271(1)(c) of the Act such assessment shall be deemed to constitute satisfaction of the AO for initiation of the penalty proceedings. Therefore, the Id. DR has submitted that recording of satisfaction in the assessment order is in compliance of provisions of Section 271(1B) of the Act. As regard uncertain charges alleged by the assessee the Id. DR has submitted that this issue has been duly considered by the AO in the remand report as well as by the Id. CIT(A) and the Assessing Officer has given a definite finding while passing the penalty order U/s 271(1)(c) of the Act that the penalty is levied for concealment of income. She has relied upon the orders of the authorities below.

6. We have considered the rival submissions as well as relevant material on record. The assessee has not disputed the discrepancy found regarding the suppression of the purchases recorded in the books

of account. During the assessment proceedings, the AO has clearly recorded the facts regarding the purchase made by the assessee as reflected in form 26AS as under:-

Sr. No.	Name	Amount	TCS
1.	Dist. Excise Officer, Amer.	6479130.00	65200.00
2.	Raj State Ganganager Sugar Mills	4063199.00	40660.00
3.	Raj State Beverage Corp. Ltd.	10171997.37	109416.85
	Total	20714326.37	215276.85

These facts as found by the AO in form 26AS were not disputed by the assessee during the assessment proceedings and consequently the AO has made an addition of the differential amount of Rs. 6,05,536/-. It is not a case claim of deduction by the assessee which was not allowed by the AO but it is a case of concealment of certain transactions thereby the assessee has suppressed the purchases recorded in the books of accounts. This fact was detected by the AO when he has examined the details given in form 26AS. Therefore, the decision relied upon by the assessee that mere disallowance or addition made by the AO would not amount to concealment of particulars of income or furnishing inaccurate particulars of income are not applicable. Those decisions are applicable when the assessee made a claim of deduction which is a bonafide claim

but the same was disallowance by the AO as the claim is not allowable as per provisions of the Act. Thus the decisions relied by the assessee including judgment of Hon'ble Supreme Court in case of CIT vs. Reliance Petroproducts Pvt. Ltd. 322 ITR 158 are not applicable in the facts of the present case. Therefore, the assessee has no case on the merits of levy of penalty U/s 271(1)(c) of the IT Act.

7. As regards the assessee's objection against the validity of initiation of penalty proceedings we find that the assessee is challenging the initiation of the proceedings for levy of penalty U/s 271(1)(c) of the Act on the ground that the Assessing Officer in the assessment order has initiated the penalty for furnishing wrong particulars of income. However, the satisfaction recorded in the assessment order does not require any specific charge but the statement of the AO that penalty proceedings U/s 271(1)(c) of the Act are separately initiated is sufficient. Therefore, the satisfaction recorded by the AO in the assessment order shall have no legal implementation as regard the charge for which the penalty is initiated and finally levied. The notice issued by the AO U/s 274 of the Act though states that the penalty proceedings U/s 271(1)(c) of the Act are initiated for furnishing inaccurate particulars of income or concealment of particulars of

income. Therefore, the Assessing Officer has not specified the definite charge for initiation of penalty in the notice issued U/s 274 of the Act however, in the penalty order passed U/s 271(1)(c) of the Act the Assessing Officer has given a definite finding as under:-

" In view of this it is concluded that the assessee has intentionally concealed his income of Rs. 6,05,536/-. Therefore looking to the facts of the case, I am satisfied that it is fit case of levy of penalty u/s 271(1)(c) of the IT Act. Hence, I impose penalty u/s 271(1)(c) of the IT Act, 1961."

Therefore, even if the AO has not mentioned a specific/definite charge for initiation of penalty U/s 271(1)(c) of the Act at the time of issuing notice U/s 274 of the Act if the AO has given a definite finding at the time of levy of penalty then initiation of the penalty proceedings cannot be held as invalid. The assessee has relied upon the Third Member decision of the Amritsar Benches in case of HPCL Mittal Energy Ltd. vs. ACIT 97 Taxmann.com 3 wherein the Tribunal has held in para 11 to 21 are as under:-

"11. It transpires from the above discussion that, insofar as the issue before me is concerned, there are broadly two different stages having bearing on the imposition of penalty, namely, assessment and penalty. At the assessment stage, the AO has to record a satisfaction in the assessment order as to whether the additions/disallowances, on which penalty is likely to be imposed,

represent concealment of particulars of income or furnishing of inaccurate particulars of income. There can be two sub-stages in penalty proceedings requiring the AO to record such satisfaction, viz., at the time of initiating the penalty proceedings and at the time of passing the penalty order. I will deal with such two stages in the present context.

(a) Recording of satisfaction at the assessment stage.

12. *It has been noticed hereinabove that the first stage of imposition of penalty is recording of satisfaction by the AO in the assessment order as to whether the assessee concealed the particulars of income or furnished inaccurate particulars of income. There was a lot of litigation on this point. The assessees were contending before the appellate courts that the AO had not recorded proper satisfaction in the assessment order and hence the penalty should be deleted. On the other hand, the Department was contending that the satisfaction was properly recorded. Considering the magnitude of litigation on the point, the Finance Act, 2008, inserted sub-section (1B) to section 271, w.r.e.f. 1.4.1989, which runs as under: —*

'Where any amount is added or disallowed in computing the total income or loss of an assessee in any order of assessment or reassessment and the said order contains a direction for initiation of penalty proceedings under clause (c) of sub-section (1), such an order of assessment or reassessment shall be deemed to constitute satisfaction of the Assessing Officer for initiation of the penalty proceedings under the said clause (c).'

13. *The effect of this insertion is that when an amount is added or disallowed in an assessment and the order contains a direction for initiation of penalty proceedings u/s. 271(l)(c), it shall be deemed to constitute satisfaction of the AO for initiation of the penalty proceedings. Crux of the new provision is that a mere direction in the assessment order to initiate penalty proceedings under clause (c) is sufficient to conclude that the AO recorded proper satisfaction*

as to whether the additions/disallowances are 'concealment of particulars of income' or 'furnishing of inaccurate particulars of income' or both. It is incorrect to argue that even after the insertion of sub-section (1B), the AO still needs to specifically record as to whether each item of addition/disallowance is a case of concealment of particulars of income or furnishing of inaccurate particulars of income. Deeming 'satisfaction' under clause (c) in terms of sub-section (1B) means deeming 'proper satisfaction' and 'proper satisfaction' means getting satisfied as to whether it is a case of concealment of particulars of income or furnishing of inaccurate particulars of such income. It cannot be conceived that a direction to initiate penalty proceedings in the assessment order is only 'satisfaction' and not 'proper satisfaction'. This contention, if taken to a logical conclusion, would mean that after such a direction in the assessment order constituting his satisfaction, the AO should once again specifically record satisfaction with reference to each addition or disallowance as to whether it is a case of concealment or furnishing of inaccurate particulars. It is obviously an absurd proposition and goes against the unambiguous language of the provision. Thus, it is overt that after insertion of sub-section (1B) to section 271, invariably, the AO should be deemed to have recorded proper satisfaction with reference to each addition/disallowance as to concealment or furnishing of inaccurate particulars, once a direction is contained in the assessment order to initiate penalty u/s. 271(l)(c) of the Act. Requiring the recording of separate satisfaction, once again, by the AO would militate against the deeming provision contained in sub-section (1B). Admittedly, in all the four appeals under consideration, the AO directed to initiate penalty u/s. 271(l)(c) of the Act in the assessment orders. Thus, the Revenue can be safely considered to have successfully passed out the first stage.

(b) Recording of satisfaction at the penalty stage

14. *It has been noted above that penalty proceedings are separate from assessment proceedings, which get kicked with the*

issue of notice u/s. 274 and culminate in the penalty order u/s. 271(l)(c) of the Act. Many a times, penalty initiated in the assessment order on one or more counts by means of notice u/s. 274, is not eventually imposed by the AO on getting satisfied with the explanation tendered by the assessee in the penalty proceedings. In any case, confronting the assessee with the charge against him is sine qua non for any valid penalty proceedings. It is only when the assessee is made aware of such a charge against him that he can present his side. Thus prescribing the charge in the penalty notice and penalty order is must. Absence of a charge in the penalty notice or not finding the assessee guilty of a clear offence in the penalty order, vitiates the penalty order.

15. *The moot question is that what should be the nature of specification of a charge by the AO at the stage of initiation of penalty proceedings and at the time of passing the penalty order. Is the AO required to specify in the penalty notice/order as to whether it is a case of 'concealment of particulars of income'; or 'furnishing of inaccurate particulars of income'; or both of them, which can be expressed by using the word 'and' between the two expressions. When the AO is satisfied that it is a clear-cut case of concealment of particulars of income, he must specify it so in the notice at the time of initiation of penalty proceedings and also in the penalty order. The AO cannot initiate penalty on the charge of 'concealment of particulars of income', but ultimately find the assessee guilty in the penalty order of 'furnishing inaccurate particulars of income'. In the same manner, he cannot be uncertain in the penalty order as to concealment or furnishing of inaccurate particulars of income by using slash between the two expressions. When the AO is satisfied that it is a clear-cut case of 'furnishing of inaccurate particulars of income', he must again specify it so in the notice at the time of initiation of penalty proceedings and also in the penalty order. After initiating penalty on the charge of 'furnishing of inaccurate particulars of income',*

he cannot impose penalty by finding the assessee guilty of 'concealment of particulars of income'. Again, he cannot be uncertain in the penalty order as to concealment or furnishing of inaccurate particulars of income by using slash between the two expressions. When the AO is satisfied that it is a clear-cut case of imposition of penalty u/s. 271(l)(c) of the Act on two or more additions/disallowances, one or more falling under the expression 'concealment of particulars of income' and the other under the 'furnishing of inaccurate particulars of income', he must specify it so by using the word 'and' between the two expressions in the notice at the time of initiation of penalty proceedings. If he remains convinced in the penalty proceedings that the penalty was rightly initiated on such counts and imposes penalty accordingly, he must specifically find the assessee guilty of 'concealment of particulars of income' and also 'furnishing of inaccurate particulars of income' in the penalty order. If the charge is not levied in the above manner in all the three clear-cut situations discussed above in the penalty notice and also in the penalty order, the penalty order becomes unsustainable in law.

16. *The Hon'ble Karnataka High Court in CIT v. Manjunatha Cotton and Ginning Factory [\[2013\] 359 ITR 565/218 Taxman 423/35 taxmann.com 250](#) has held that a person who is accused of the conditions mentioned in section 271 should be made known about the grounds on which they intend imposing penalty on him as section 274 makes it clear that assessee has a right to contest such proceedings and should have full opportunity to meet the case of the Department and show that the conditions stipulated in section 271(l)(c) do not exist as such he is not liable to pay penalty. The Hon'ble High Court went on to hold that: 'Clause (c) deals with two specific offences, that is to say, concealing particulars of income or furnishing inaccurate particulars of income.... But drawing up penalty proceedings for one offence and finding the assessee guilty of another offence or*

finding him guilty for either the one or the other cannot be sustained in law..... Thus once the proceedings are initiated on one ground, the penalty should also be imposed on the same ground. Where the basis of the initiation of penalty proceedings is not identical with the ground on which the penalty was imposed, the imposition of penalty is not valid'.

17. *In Manu Engg. Works (supra) penalty was imposed by noting: 'that the assessee had concealed its income and/or that it had furnished inaccurate particulars of such income'. Striking down the penalty, the Hon'ble High Court held that: 'it was incumbent upon the IAC to come to a positive finding as to whether there was concealment of income by the assessee or whether any inaccurate particulars of such income had been furnished by the assessee. No such clear-cut finding was reached by the IAC and, on that ground alone, the order of penalty passed by the IAC was liable to be struck down.'*

18. *In Padma Ram Bharali (supra), the Hon'ble High Court did not sustain penalty levied u/s. 271(I)(c) when: 'the initiation of the penalty proceeding was for concealment of the particulars of income. But the Tribunal finally held that the assessee would be deemed to have concealed the particulars of income or to have furnished inaccurate particulars of such income.'*

19. *Thus it is evident that when the AO is satisfied at the stage of initiation of penalty proceedings of a clear-cut charge against the assessee in any of the three situations discussed above (say, concealment of particulars of income), but imposes penalty by holding the assessee as guilty of the other charge (say, furnishing of inaccurate particulars of income) or an uncertain charge (concealment of particulars of income/furnishing of inaccurate particulars of income), the penalty cannot be sustained.*

20. *Another crucial factor to be kept in mind is that the satisfaction of the AO as to a clear-cut charge leveled by him in the penalty notice or the penalty order must concur with the*

actual default. If the clear-cut charge in the penalty notice or the penalty order is that of 'concealment of particulars of income', but it turns out to be a case of 'furnishing of inaccurate particulars of such income' or vice-versa, then also the penalty order cannot legally stand.

21. *Apart from the above three situations in which the AO has clear-cut satisfaction, there can be another fourth situation as well. It may be when it is definitely a case of under-reporting of income by the assessee for which an addition/disallowance has been made, but the AO is not sure at the stage of initiation of penalty proceedings of the precise charge as to 'concealment of particulars of income' or 'furnishing of inaccurate particulars of income'. In such circumstances, he may use slash between the two expressions at the time of initiation of penalty proceedings. However, during the penalty proceedings, he must get decisive, which should be reflected in the penalty order, as to whether the assessee is guilty of 'concealment of particulars of income' or 'furnishing of inaccurate particulars of such income'. Uncertain charge at the time of initiation of penalty, must necessarily be substituted with a conclusive default at the time of passing the penalty order. If the penalty is initiated with doubt and also concluded with a doubt as to the concealment of particulars of income or furnishing of inaccurate particulars of such income etc., the penalty order is vitiated. If on the other hand, if the penalty is initiated with an uncertain charge of 'concealment of particulars of income/furnishing of inaccurate particulars of income' etc., but the assessee is ultimately found to be guilty of a specific charge of either 'concealment of particulars of income' or 'furnishing of inaccurate particulars of income', then no fault can be found in the penalty order."*

Therefore, even if the AO was not certain about the charge at the time of initiation of the penalty proceedings but he has given a definite

conclusive finding regarding the default or charge at the time of passing the penalty order then no default cannot be found in the penalty order. In view of the above discussion, when the AO has given a certain and definite finding at the time of passing the penalty order then there is no illegality in the penalty order passed U/s 271(1)(c) of the IT Act.

In the result, the appeal of the assessee is dismissed.

Order pronounced in the open court on 21/07/2020.

Sd/-

(रमेश सी० शर्मा)
(Ramesh. C. Sharma)

लेखा सदस्य / Accountant Member
जयपुर / Jaipur

दिनांक / Dated:- 21/07/2020.

*Santosh.

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Shri Kanheya Lal, Ajmer.
2. प्रत्यर्थी / The Respondent- ITO, Ward-1(3), Ajmer.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 1316/JP/2019}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar