

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

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 1258/JP/2018
निर्धारण वर्ष/Assessment Year : 2008-09

Smt. Teeja Devi Saini W/o Late Shri Nathu Mali Village-Murlipura, Jaipur	बनाम Vs.	ITO, Ward-4(3), Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AYOPT7652H		
अपीलार्थी/ Appellant		प्रत्यर्थी/ Respondent

निर्धारिती की ओर से/ Assessee by : Sh. Hemang Gargieya (Adv.)
राजस्व की ओर से/ Revenue by : Ms Chanchal Meena (Addl. CIT)

सुनवाई की तारीख/ Date of Hearing : 24/09/2020
उद्घोषणा की तारीख/ Date of Pronouncement: 29/09/2020

आदेश/ ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order of Id. CIT(A)-2, Jaipur dated 28.08.2018 challenging the levy of penalty amounting to Rs. 48,505/- u/s 271(1)(c) of the Act for A.Y 2008-09.

2. Heard both the parties and perused the material available on record. One of the contentions advanced by the Id. AR was that from the perusal of the assessment order and the show cause notice issued u/s 274 r/w S. 271(1)(c) dated 22.03.2016, it is not at all clear as to for what precise charge, the appellant was asked to show cause viz. whether the charge is that the assessee has furnished inaccurate

particulars of income or it was for concealing particulars of such income in as much as a bare perusal of the said show cause notice clearly reveal that the inappropriate words/unwanted charge has not been struck off. The AO neither scored out nor ticked which particular part of alleged offence, he was relying on. In facts, this confusion even continued while passing the impugned penalty order in as much as at Pg 2, where he used the words "...करदाता ने जानबूझकर अपनी आय के स्पष्टतः सही पेश नहीं किए हैं और अपनी आय का करारोपण से छिपाव किया है". Thus, the AO is highly confused and remained inconclusive till last when he imposed the penalty. His confusion is evident from the fact that he used both the limbs interchangeably which is not permissible. It was further submitted that if it is alleged that inaccurate particulars were furnished, it goes to show that income was declared and once AO accepts that income was declared there cannot be any charge of inaccurate particulars because the returned income and assessed income w.r.t LTCG of Rs. 3,97,730/- is same. Thus, there appears no precise charge/satisfaction under which the AO wants to impose a penalty and hence, the impugned penalty be deleted. In support, reliance was placed on CIT & Anr. v. Manjunatha Cotton and Ginning Factory 359 ITR 565 (Karn), HPCL Mittal Energy Ltd. v. ACIT [2018] 97 taxmann.com 3 (Amritsar - Trib.) (TM) and Sheveta Construction Co. Pvt. Ltd. vs. ITO (*in DB No. 534/2008 vide order dated 06.12.2016*).

3. Per contra, the Id. DR referred to the assessment order and submitted that the penalty has been initiated for concealment of income and there is a clear narration to this effect in the assessment order. Regarding the show-cause notice, she has submitted that even where the specific charge has not been specified, the assessee has been given

adequate opportunity and no prejudice has been caused to the assessee. It was further submitted that it is a case where both the charges of concealment of income as well as furnishing of inaccurate particulars of income are attracted as the assessee has concealed and not disclosed capital gains of sale of the land. Further, commission amounting to Rs. 25,000/- has been claimed in the return of income which has been disallowed by the Assessing Officer and thus, shows furnishing of inaccurate particulars of income. In support, the Id DR has relied on the High Court of Madras decision in case of Sundram Finance Ltd vs. ACIT, Chennai reported in 93 Taxmann.com 250(Mad) and the Bombay High Court decision in case of CIT vs. Smt. Kaushalya & others reported in 216 ITR 660(Bom).

4. We have heard the rival contentions and perused the material available on record. In the instance case, we find that the penalty proceedings have been initiated during the course of assessment proceedings for concealing the particulars of income regarding long term capital gains on sale of immovable property and therefore, as far as recording of satisfaction during the course of assessment proceedings, there is no ambiguity. Thereafter, in terms of show cause notice issued by the Assessing Officer u/s 274 read with 271(1)(c) dated 22.03.2016 reads as under:-

"Dated: 22.03.2016

To,

Smt. Teeja Devi Saini

W/o Late Shri Nathu Mali

Village- Murlipura, Jaipur

Whereas in the course of proceedings before me for the assessment year 2008-09, it appears to me that you:-

**have without reasonable cause failed to furnish me return of income which you were required to furnish by a notice given under section 22(1)/22(2)/34 of the Indian Income tax Act, 1922 or which you were required to furnish under section 139 (1) or by a notice given under section 139(2)/148 of the Income tax Act, 1961, No. dated or have without reasonable cause failed to furnish it within the time allowed and to the manner required by the said section 139 (1) or by such notice.*

**have without reasonable cause failed to comply with a notice under section 22(4)/23(2) of the Indian Income tax Act, 1922 or under section 142 (1)/ 143 (2) of the Income tax Act, 1961 No. dated*

**have concealed the particulars of your income or furnished inaccurate particulars of such income.*

You are hereby requested to appear before me at 11.00 AM on 12.04.2016 and show cause why an order imposing a penalty on you should not be made under section 271(1) (c) of the Income tax Act, 1961. If you do not wish to avail your self of this opportunity of being heard in person or through your authorized representative you may show cause in writing on or before the said date which will be considered before any such order is made under section 271 (1) (c)."

5. Thereafter, while passing the penalty order dated 19.09.2016, the AO has held that the assessee has deliberately not furnished correct particulars of income and has concealed his income and hence, liable for penalty u/s 271(1)(c) of the Act.

6. It is a settled legal proposition that concealment of income and furnishing of inaccurate particulars of income are specific and independent charges and carry their respective meanings. The AO need to be clear in terms of which specific charge he wants to invoke in a particular case and where both the charges are applicable, have to say so in the penalty notice and has to record a specific finding in the penalty order as held by the Hon'ble Rajasthan High Court in case of Sheweta Constructions (supra) where it was held as under:

"9. Taking into consideration the decision of the Andhra Pradesh High Court which virtually considered the subsequent law and the law which was prevailing on the date the decision was rendered on 27.08.2012. In view of the observations made in the said judgment, we are of the opinion that the contention raised by the appellant is required to be accepted and in the finding of Assessing Officer in the assessment order it is held that the AO has to give a notice as to whether he proposes to levy penalty for concealment of income or furnishing inaccurate particulars. He cannot have both the conditions and if it is so he has to say so in the notice and record a finding in the penalty order."

7. In the instant case, we find that in the show-cause notice, the Assessing officer has not initiated the penalty on a specific charge and has talked about either concealment of income or furnishing of inaccurate particulars of income, however, while levying the penalty,

the Assessing officer has talked about both concealment of income and furnishing of inaccurate particulars of income. The AO has not specified in the penalty order as to how it is a case of applicability of both the charges in the facts and circumstances of the present case. We therefore find that it is a case of lack of application of mind by the Assessing officer both at the time of initiation and final levy of penalty and the AO has failed to give a decisive finding even at the time of passing the penalty order. It is a case where the assessee has not disclosed long term capital gains on sale of an immovable property, therefore, it is a case of concealment of income whereas the AO has held the same to be a case of concealment of income as well as furnishing of inaccurate particulars of income. In case of HPCL Mittal Energy Ltd. v. ACIT (supra), the Third Member has held as under:

"21. 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."

In light of aforesaid discussions and respectfully following the jurisdictional High Court in case of Sheweta Construction(supra), we find that the penalty order so passed u/s 271(1)(c) is vitiated for want

of specific charge for levy of penalty and the penalty so levied is hereby deleted. In view of the same, we have not dealt with other contentions so advanced by both the parties on merits of the same.

In the result, appeal of the assessee is allowed.

Order pronounced in the open Court on 29/09/2020.

Sd/-
(विजय पाल राव)
(Vijay Pal Rao)
न्यायिक सदस्य / Judicial Member

Sd/-
(विक्रम सिंह यादव)
(Vikram Singh Yadav)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 29/09/2020

*Ganesh Kr.

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

1. अपीलार्थी / The Appellant- Smt. Teeja Devi Saini, Jaipur
2. प्रत्यर्थी / The Respondent- ITO, Ward 4(3), Jaipur
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. 1258/JP/2018}

आदेशानुसार / By order,
सहायक पंजीकार / Asst. Registrar