

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL,
INDORE BENCH, INDORE
BEFORE HON'BLE KUL BHARAT, JUDICIAL MEMBER
AND HON'BLE MANISH BORAD, ACCOUNTANT
MEMBER

ITA No.679/Ind/2019
Assessment Year 2009-10

DCIT-3(1),

Indore

: Revenue

V/s

Shri Deepak Kalra,

6, Shriram Nagar,

RTO Road,,

Indore

: Assessee

PAN : ALGPK9075L

Revenue by	Shri Harshit Bari, Sr.DR
Assessee by	Shri S.S. Sheetal, Adv.
Date of Hearing	18.02.2021
Date of Pronouncement	03.03.2021

ORDER

PER MANISH BORAD, A.M

The above captioned appeal filed at the instance of the Revenue pertaining to Assessment Year 2009-10 is directed against the orders of Ld. Commissioner of Income Tax(Appeals)-3 (in short 'Ld. CIT], Bhopal dated 14.03.2019 which is arising out of the order

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u/s 271(1)(c) of the Income Tax Act 1961(In short the 'Act') dated 31.03.2018 framed by JCIT (OSD) Central-I, Indore.

2. Revenue has raised following grounds of appeal:-

1. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was justified in deleting the penalty u/s 271(I)(C) of Rs.1,43,45,000/-without appreciating the factual position of the issue?

2. Whether on the facts & circumstances of the case, the Ld. CIT(A) was justified in the deleting the penalty of Rs. 1,43,45,000/- without considering the decision of Hon'ble Supreme Court in the case of M/s Mak Data (P) Ltd (2013) 38 taxman.com 48 though the same was specifically relied upon in the penalty order?

3. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was justified in deleting the penalty amounting to Rs. 1,43,45,000/- made by the AO under section 271(I)(c) of the I.T. Act by not appreciating the fact that the disclosure of income was the result of search operation on the assessee and not voluntary?

4. Whether on the facts and in the circumstances of the case, the Ld.CIT(A) was justified in ignoring that if in pursuant to search operation, penalty is not levied for unearthing of additional income detected during a search, it would be an open incentive to all to conceal their income till such time it is detected by the revenue?

5.The appellant craves leave to add to or deduct. from or otherwise amend the above grounds of appeal.

3. Brief facts of the case as culled out from the records are that the assessee is an individual and belongs to Apollo (NRK) Group of Indore. Major source of his income are from civil contract, colonizer and builder. Search and seizure operation u/s 132 of the Act were carried out on Apollo Group Indore including the assessee on 21.9.2012. During the search proceedings assessee was asked to explain the source of share application money of Rs.3.69 crores given by M/s. Airen Aditya Dev P. Ltd to M/s Exotic Exports P. Ltd (where the assessee is the Director and share holder). No incriminating material relating to the alleged transaction was found during the course of search. Still the assessee accepted to offer the alleged amount to tax and the same was included in the total income of Rs.4,31,58,695/- declared in the Income Tax Return for Assessment Year 2009-10 filed in compliance to the notice u/s 153A on 30.12.2014. The assessment u/s 153A r.w.s. 143(3) of the Act was completed on 24.03.2015 accepting the returned income. During the course of assessment proceedings itself Ld. A.O initiated the penalty proceedings u/s 271(1)(c) of the Act for the additional

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income offered in the Income Tax Return. Show cause notice was issued u/s 274 r.w.s. 271(1)(c) of the Act.

4. During the penalty proceedings assessee made submissions praying for not to levy the penalty but the Ld. A.O was not satisfied and he levied the penalty at Rs.1,43,45,000/-.

5. Aggrieved assessee preferred appeal before Ld. CIT(A) and challenged the levy of penalty on legal ground contending that proper show cause notice was not issued and on merits relied on various decisions contending that penalty was not leviable since no incriminating material was found during the course of search and the assessee has *suo moto* offered the additional income for tax. Ld. CIT(A) was satisfied with the submissions and deleted the penalty both on legal ground as well as on merits observing as follows:-

4.1 . Ground No.1 to 2:- Through these ground of appeal, the appellant has challenged the penalty proceedings u/s 271 (1)(c). The assessee has filed return of income u/s 153A for AY 2009-10 on 30.12.2014 declaring total income at Rs. 4,31,58,695/-which was assessed at Rs. 4,31,58,700/- including additional income offered of Rs. 4,22,00,000/-. The AO has accepted the return of income filed by the appellant. The AO on 24.03.2015 and 20.02.2018 issued notice u/s 271(I)(c). In compliance

the AR of the assessee attended and submitted that penalty not to be imposed for concealment of income. The AO considering the entire facts on record levied penalty u/s 271(I)(c). In AY 2009-10. It has been held by Hon'ble M.P. High Court which has been upheld by Hon'ble Supreme Court in the case of CIT Vs Suresh Chandra Mittal [2001] 251 ITR 9, that where the assessee filed revised return showing higher income after search and notice for re-opening of assessment to purchases peace and avoid litigation, the department simply rested its conclusion on the Act of voluntarily surrendered done by the assessee in good faith. High court was justified in holding that no penalty could be levied. In view of the above facts the AO is not justified in imposing the penalty on the returned income. Appellant during appellate proceedings submitted that Hon'ble ITAT, Indore vide ITA Ne 85 to. 87/IndJ2017 dated 10.01.2019 has deleted entire penalty for A.Y. 2007-08, 2008-09 and 2010-11 on the same, facts and grounds. Looking to the facts and circumstances, evidence and order of the ITAT, the penalty imposed by the AO amounting to Rs.1,43,45,000/- -in AY 2009-10 u/s 271(1)(c) is Deleted. Therefore, the appeal on these grounds is Allowed.

6. Now the Revenue is in appeal before the Tribunal challenging the finding of Ld. CIT(A).

7. Ld. Departmental Representative vehemently argued supporting the order of Ld. A.O and also submitted that if the search u/s 132 of the Act had not taken place the assessee would have not offered the additional income to tax.

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8. Per contra Ld. Counsel for the assessee referring to the paper book running page 1 to 180 filed on 30.7.2020 and also supporting the order of Ld. CIT(A) submitted that the penalty proceedings needs to be quashed as legal ground being bad in law since specific charge was not mentioned in the show cause notice as held by Hon'ble jurisdictional High Court in the case of CIT V/s Kulwant Singh Bhatia in ITA No.9 of 2018 (M.P) dated 9.5.2018. Similar view was taken by this Tribunal in assessee's own case for Assessment Years 2007-08, 2008-09, 2010-11, 2012-13 & 2013-14 ITA Nos 85 to 90/Ind/2017 dated 10.1.2019.

9. With regard to the merit of the case Ld. Counsel for the assessee submitted that no incriminating material was found during the course of survey relating to the alleged surrender made by the assessee therefore explanation 5A to Section 271(1)(c) of the Act is not applicable. He also submitted that Ld. A.O was himself not certain about the additions to be made in the correct hands as he made similar addition for the alleged share application money received in the hands of the company namely M/s Exotic Exports P. Ltd also. In other words on one hand the Ld. A.O has levied the

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penalty for the alleged share application money disclosed in the return of income by the assessee and on the other hand has made the addition on the same basis in the case of M/s Exotic Exports P. Ltd (in the books of which the share application money was received). The addition made in the hands of M/s Exotic Exports P. Ltd was subsequently deleted. Further Ld. Counsel for the assessee relied on the decisions referred by him before Ld. CIT(A) including the judgment of Hon'ble High Court of Andhra Pradesh in the case of *V.V. Projects and Investments Pvt. Ltd V/s DCIT300 ITR 40* and the Co-ordinate Bench, Kolkata in the case of *DCIT V/s M/s Shree Salasar Properties & Finance Pvt Ltd in ITA No 1081/Kol/2013* order dated 15.4.2016.

10. We have heard rival contentions and perused the records placed before us and carefully gone through the decisions referred and relied by Ld. Counsel before Ld. CIT(A) and also before us. Revenue's sole grievance is against the finding of Ld. CIT(A) deleting the penalty made u/s 271(1)(c) of the Act at Rs.1,43,45,000/- on the income surrendered during the course of search and offered to tax in the return filed in response to notice u/s 153A of the Act. Search was carried out at the premises of the assessee on

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21.09.2012 being part of the Apollo (NRK) Group, Indore. There was a transaction of share application money of Rs.3.90 crores received by M/s Exotic Exports P. Ltd (where the assessee is Director and share holder) which was received from M/s Airen Aditya Dev P. Ltd. This fact is not disputed at the end of revenue that no incriminating material with regard to the alleged transaction of share application money received by M/s Exotic Exports P. Ltd was found during the course of search carried out u/s 132 of the Act. However assessee accepted to offer to tax the alleged share application money and other amount of Rs.53,00,000/- totaling to Rs.4,22,00,000/- as additional income and the same was duly disclosed in the Income Tax Return filed on 30.12.2014. The returned income was accepted by the Ld. A.O as assessed income. The Ld. A.O initiated the penalty proceedings and levied the penalty u/s 271(1)(c) of the Act on the additional income offered at Rs.4,22,00,000/-.

11. Now the question before us are that *“whether under given facts the action by Ld. A.O of levy of penalty u/s 271(1)(c) of the Act was justified on legal ground as well as on merits”*.

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12. Though it is the revenue's appeal but in the finding of Ld. CIT(A) the assessee's appeal has been allowed both on legal and merits, therefore adjudication about the legality of penalty proceeding is necessary at this juncture.

13. We will first take up the legal ground. We find that following show cause notice was issued to the assessee:-

To,

Shri Deepak Kalra,

6, Shriram Nagar,

Indore 452001

NOTICE UNDER SECTION 274 READWITH SECTION 271(1)(c)
OF THE INCOME TAX ACT, 1961

Whereas in the course of proceedings before me for the A.Y. 2008-09 it appears to me that you :-

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

You are hereby requested to appear before me at 03.30 PM on 10/04/2015 and show cause why an order imposing 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 yourself of this opportunity of being heard in person or through authorised representative, you may show cause in writing or before the said date which will be considered before any such order is made under section 271(1)(c).

Sd/-

(Ram Kumar Yadava)

Dy. Commissioner of Income Tax (Central)-1, Indore

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14. From going through the above show cause notice it is very much clear that the Ld. A.O failed to strike off one of the specific charge levied against the assessee which thus violates the principle of natural justice available to the assessee as provided u/s 274 of the Act. In similar set of facts in assessee's own case for Assessment Years 2007-08, 2008-09, 2010-11, 2012-13 & 2013-14 this Tribunal in ITA Nos 85 to 90/Ind/2017 dated 10.1.2019 deleted the levy of penalty by holding the penalty proceedings as *void ab initio* relying on the judgment of Hon'ble High Court in the case of Kulawant Singh Bhatia (supra) observing as follows:-

6. We find that the notice issued for levy of penalty dated 24.3.2015 do not contain the specific charge. The notice dated 24.3.2015 is reproduced as under for the sake of clarity:

To,

M/s SM and SM Resorts-N-Hotels International Ltd,

NRK Business Park, B1, PU-4, 3rd floor.

Schem No.54, Behind Mangal City

Indore 452001

NOTICE UNDER SECTION 274 READWITH SECTION 271(1)(c)
OF THE INCOME TAX ACT, 1961

Whereas in the course of proceedings before me for the

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A.Y. 2011-12 it appears to me that you :-

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

You are hereby requested to appear before me at 03.30 PM on 10/04/2015 and show cause why an order imposing 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 yourself of this opportunity of being heard in person or through authorised representative, you may show cause in writing or before the said date which will be considered before any such order is made under section 271(1)(c).

Sd/-

(Ram Kumar Yadava)

Dy. Commissioner of Income Tax (Central)-1, Indore

7. The Hon'ble jurisdictional High Court in the case of PCIT-I vs Kulwant Singh Bhatia (*supra*) in paras 9 to 11 has held as under:-

9. Considering the aforesaid, the Tribunal has held that the penalty levied under Section 271(1)(c) of the Act of 1961 is not sustainable in law, as no specific charge was levied in penalty show-cause notices and allowed the appeal No.ITA (Appeal) 414/Ind/2012 and other five appeals.

10. It is submitted that the provision of Section 271(1)(c) together with Explanation 5(A) brings the assessee liable for imposition of penalty in respect of additional income, which has been offered following the search and the Assessing Officer is satisfied that it is a fit case for initiation of penalty proceedings under Section 271(1)(c) and 271(AA) of the Act of 1961. The learned Tribunal has committed an error in allowing the appeal and setting aside the well reasoned order of penalty. She also submits that the ITAT erred in

not considered the satisfaction recorded by the Assessing Officer. She during the course of the arguments very specifically admitted that tax effect in this case is only Rs.2,84,090/- for the assessment year 2002-03. The total amount of penalty for the assessment year in all these appeals for the assessment years 2002-03 to 2007-08 is Rs.24,39,753 and the learned ITAT has decided all these appeals by composite order dated 11.8.2017. It is covered in para 5 of the Circular No.21 of 2015 dated 10.12.2015 and, therefore, the present appeals have been filed.

11. On due consideration of the arguments of the learned counsel for the appellant, so also considering the fact that the ground mentioned in show-cause notice would not satisfy the requirement of law, as notice was not specific, we are of the view that the learned Tribunal has rightly relying on the decision of CIT V/s. Manjunatha Cotton Ginning Factory (supra) and CIT V/s. SSA'S Emerald Meadows (supra) rightly allowed the appeal of the assessee and set aside the order of penalty imposed by the authorities. No substantial question of law is arising in these appeals. ITA.No(s).9/2018, 10/2018, 11/2018, 12/2018, 13/2018 and 14/2018, filed by the appellant have no merit and are hereby dismissed.

8. The revenue has not brought any contrary material suggesting that a valid notice was served on the assessee for initiating proceedings u/s 271(1)(c) of the Act. This Tribunal is bound by the judgment of the Hon'ble jurisdictional High Court. Respectfully following the same penalty proceedings initiated by the A.O vide notice dated 24.3.2015 are held to be bad in law and contrary to the judgment of the Hon'ble M.P. High Court in the case of PCIT-I Vs. Kulwant Singh Bhatia (supra). Accordingly, the impugned penalty order is hereby quashed, being bad in law.

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9. In the result, the appeal filed by the assessee in ITA No.789/Ind/2017 is allowed.

15. Ld. Departmental Representative failed to controvert the fact that the legal issue raised in the instant appeal is squarely covered by the decision of this Tribunal in assessee's own case. We therefore respectfully following the same are of the considered view that the Ld. CIT(A) was justified in deleting the penalty on legal ground by holding the penalty proceedings as *void ab initio* as the Ld. A.O failed to level the specific charge against the assessee. Thus on the legal ground itself the appeal of revenue deserves to be dismissed.

16. However for academic purpose we would like to deal with the merits of the case. No incriminating material was found during the course of search relating to the alleged surrender of income made by the assessee in the Income Tax Return. The assessee *suo moto* offered the additional income in the return and paid taxes there on. It is also an established fact in the instant case that Ld. A.O was not sure that which assessee has concealed the particulars of income or furnished inaccurate particulars of income. Even though

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the share application money was received by M/s Exotic Exports P Ltd and duly reflected in its books of accounts but Ld. A.O accepted the additional income offered by the assessee in his individual capacity and levied the penalty also. Simultaneously the Ld. A.O also made addition in the hands of M/s Exotic Exports P Ltd for the similar amount of share application money and initiated the penalty proceedings. In the given facts and circumstances itself the revenue fails to succeed and the action of initiating penalty by Ld. A.O is unjustified.

17. We also observe that the Hon'ble High Court of Andhra Pradesh in the case of *V.V. Projects and Investments Pvt. Ltd* in similar set of facts held the action of Ld. A.O of invoking power u/s 271(1)(c) of the Act as unjustified observing as follows:-

The Hon 'ble High Court in the case of V. V. Projects and Investments Pvt. Ltd. , Vs. DCIT 300 ITR 40 (A.P.) held that the language of subsection(1) of section 271 itself makes it clear that recording of satisfaction of concealment o/income. by a person 'or furnishing inaccurate particulars of such income is a condition precedent for levying penalty invoking the power under section 271 (1/ The AO has to form his .own opinion and record his satisfaction of concealment a/income or furnishing inaccurate particulars of income before initiating penalty proceedings under s. 271 (1)(c) of the Act. It is also clear that such satisfaction of

the AO must be spelt out in the order of assessment itself but cannot be assumed from the issue of a notice under s. 271(1)(c) of the Act. Failure to record such satisfaction amounts to a jurisdictional defect which cannot be cured. It is also relevant to note that whether the assessee has concealed his income or has deliberately furnished inaccurate particulars thereof is essentially a finding of fact which has to be spelt out by way of recording the satisfaction of the AO as required under s. 271 (1) of the Act. Therefore, in the absence of such a finding in the assessment order no penalty proceedings can be initiated: The declaration of income made by the assessee in revised return and the explanation that, it had, done so to buy peace with the Department and to avoid protracted litigation. Was accepted by the AD without raising any objection. Admittedly the AO accepted the return filed by the assessee after verification of the information filed and books of account produced. Thus; the assessment was completed accepting the returned net income as per the revised return of income. Not only the assessment order did not reflect any satisfaction as required under s. 271 (1)(c) of the Act but even the show-cause notice was silent with reference to the satisfaction arrived at by the AO with reference to the concealment of income by the assessee. Nothing has been placed by the Revenue to show that any other material was available with the AO to the effect that the assessee concealed the income. In the circumstances; it is not open to the AD to invoke the power, under s. 271(1)(c) levying penalty. '

In the case of M/s. Bhandari Construction Company, DCIT, ITAT, Pune Bench held that so far as the addition regarding loan obtained from Mr. Soni is concerned. it is a fact that the assessee has admitted and not contested the addition in the quantum appeal. The loan obtained from Mr. Soni was already reflected in the balance sheet filed along with the original return of income which was filed prior to the date of search. Merely because the assessee did not contest the addition and accepted the same, penalty u/s.271 (1)(C) of the Income Tax in

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the given facts and circumstances of the case is not. leviable:. Penalty is leviable only if any incriminating material is found during the course of search.

18. In almost identical facts similar view was taken by the Co-ordinate Bench, Kolkata in the case of *DCIT V/s M/s Shree Salasar Properties & Finance Ltd ITA No.1081/Kol/2013 order dated 15.4.2016 (supra)* and relevant extract of the finding of Tribunal is reproduced below which has been arrived at after relying on the judgment of Hon'ble Apex Court in the case of *Sudharshan Silks & Sarees V/s CIT (2008) 300 ITR 205* and other judgments of Co-ordinate Benches:-

8.4. From the above definition, it is very clear that there should be some undisclosed income in the form of money, bullion etc or any entry in the books of account or other documents and the same should be found in the course of search. It is undisputed that nothing incriminating was found during the course of search by the search party with regard to the aspect of share capital and loans which were ultimately offered to tax by the assessee in the sum of Rs. 1.75 crores. Hence it goes to prove beyond doubt that the offer of undisclosed income of Rs. 1.75 crores was made voluntarily by the assessee without any detection by the department and accordingly the argument of the Learned DR that but for the search, this income would not have been offered does not hold any water and deserves to be dismissed. It is already well settled that though the income is not disclosed in the return filed u/s 139(1) of the Act, but duly disclosed in the petition filed u/s 132(4) of the Act followed by the filing of return in response to section 153A of the Act and taxes paid thereon, then the

assessee would not be invited with the levy of penalty. We find that if the argument of the Learned DR that since the assessee had not offered the said income in return filed u/s 139(1) of the Act thereby levy of penalty is in order is to be accepted, then it would make the immunity provisions contemplated u/s 271AAA(2) of the Act redundant. The legislature in its wisdom had given a thoughtful consideration on the facts and circumstances under which the assessee would not be invited with the levy of penalty pursuant to the search subject to fulfillment of certain conditions stipulated in the said section . Hence in view of the above, we hold that the levy of penalty is not automatic and assessee is clearly entitled for immunity from levy of penalty.

19. Examining the facts of the instant case in the light of above decisions, we find that in the case of assessee penalty was levied on the additions made for unexplained share application money and unsecured loans. No incriminating material was found during the course of search relating to the additional income offered by the assessee during the course of search which was subsequently honoured by disclosing in the return of income and paying taxes thereon. Transaction of alleged share application money was duly reflected in the regular books of accounts. Under these given facts and circumstances of the case the ratio laid down in the above referred decisions is squarely applicable on the issue before us and we therefore respectfully following the same are of the considered

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view that on merits also the revenue fails to succeed as the Ld. A.O was not justified in levying the penalty u/s 271(1)(c) of the Act. Since the revenue failed to succeed on both legal ground as well as ground on merits, no interference is called for in the finding of Ld. CIT(A). All effective grounds raised by the Revenue are dismissed.

20. In the result appeal of the revenue stands dismissed.

The order pronounced in the open Court on
08.03.2021.

Sd/-

(KUL BHARAT)
JUDICIAL MEMBER

Sd/-

(MANISH BORAD)
ACCOUNTANT MEMBER

दिनांक /Dated : 8th March, 2021

/Dev

Copy to: The Appellant/Respondent/CIT concerned/CIT(A)
concerned/ DR, ITAT, Indore/Guard file.

By Order,
Asstt.Registrar, I.T.A.T., Indore