

**IN THE INCOME TAX APPELLATE TRIBUNAL DELHI
BENCH 'F', NEW DELHI**

**BEFORE SH. ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND SH. KULDIP SINGH, JUDICIAL MEMBER**

(THROUGH VIDEO CONFERENCING)

ITA No.5089/Del/2017
(Assessment Year : 2009-10)

Radhika Surgical Pvt. Ltd. C-30, Panchsheel Enclave, New Delhi-110017 PAN : AADCR 5053 L	Vs.	ACIT Central Circle – 6, New Delhi
(APPELLANT)		(RESPONDENT)

Assessee by	Shri P. C. Yadav, Adv.
Revenue by	Shri Farhad Khan, Sr. D.R.

Date of hearing:	05/04/2021
Date of Pronouncement:	31/05/2021

ORDER

PER ANIL CHATURVEDI, AM :

This appeal filed by the assessee is directed against the order dated 29.06.2017 of the Commissioner of Income Tax (Appeals)-24, New Delhi pertaining to Assessment Year 2009-10.

2. The relevant facts as culled from the material on records are as under:

3. A search and Seizure operation u/s 132 of the Act was conducted at business premises of companies of Rockland Group

as well as at the residential premises of directors of the companies on 06.09.2011. Notice u/s 153C of the Act was issued on 05.09.2013 to the assessee and in response to which assessee filed return of income declaring Nil income on 10.09.2013. Pending assessment u/s 153C of the Act, assessee approached the Settlement Commission u/s 245C of the Income Tax Act in the capacity of a person related to other assesseees of the Rockland Group declaring an additional income of Rs.1,00,000/-. The assessee's application was rejected by the Hon'ble Settlement Commission. Thereafter, assessment was completed u/s 153C on 20.06.2014 determining the total income of Rs.9,24,000/- after making following additions:

Addition on a/c of unexplained cash credit (On protective basis)	Rs.8,00,000/-
Addition on a/c of unexplained expenditure	Rs.24,000/-
Addition on a/c of additional income declared before the Settlement Commission	<u>Rs.1,00,000/-</u>
Total	<u>Rs.9,24,000/-</u>

4. Aggrieved by the order of AO, assessee carried the matter before the CIT(A). CIT(A) granted partial relief to assessee and confirmed the addition of Rs.8000/- on account of unexplained expenditure and addition of Rs.1,00,000/- pertaining to additional income declared before Settlement Commission.

5. On the aforesaid additions which were confirmed by CIT(A), AO initiated the penalty proceedings u/s 271(1)(c) and thereafter vide order dated 29.03.2017 levied penalty of Rs.33,372/- u/s 271(1)(c) of the Act.

6. Aggrieved by the order of AO, assessee carried the matter before the CIT(A) who dismissed the appeal of the assessee. Aggrieved by the order of CIT(A), assessee is now before us and has raised the following grounds:

- “1. That the Ld CIT(A) has erred in upholding the penalty of Rs.33,372/- imposed by the AO., invoking the provisions of Section 271(1)(c) of the IT Act 1961.
2. That the Ld CIT(A) has erred in upholding the penalty of Rs.33,372/-, without considering the facts and circumstances of the case and relying on irrelevant judicial pronouncements.
3. That the impugned appellate order is arbitrary, illegal, bad in law and in violation of rudimentary principles of contemporary jurisprudence.
4. That the Appellant craves leave to add/ alter any/ all grounds of appeal before or at the time of hearing of the Appeal.”

7. Subsequently, assessee vide letter dated 20.10.2020 has raised the following additional grounds:

- “a) On the facts and under the circumstances of the case the penalty levied under section 271(1)(c) of the Act is void as the notice u/s 274 Read with Section 271 is bad and defective as it is issued without deleting the appropriate clause under which the penalty is proposed to be imposed is either for filing of inaccurate particular of income or concealment of particular of income and as such the notice is not sustainable and not curable.
6. It is well settled that an assessee can raise a legal additional ground or even fresh legal plea at any stage of the proceedings. In support the appellant seeks to rely on the judgments of Apex Court in the case of CIT Vs Varas International reported in 284 ITR 80(SC) and NATIONAL THERMAL POWER CO. LTD vs. CIT reported in 229 ITR 383(SC). Special Bench decision in the case of DHL operators reported in 108 TTJ 152(SB).

383 (SC) Special Bench decision in the case of DHL operators reported in 108 TTJ 152(SB).

7. *It is further relevant to mention here that the assessee had not raise this ground categorically at the time of filing as the assessee was under bonafide belief that ground number 3 would cover the legality of proceedings. And hence delay in raising the above grounds is a bonafide delay and hence the same may kindly be condoned.*
8. *It is also position of law that limitation of additional ground would relate backs to original grounds as held in the following cases.*
 - a. *Shilpa Associates vs. ITO 263 ITR 0317 (Raj)*
 - b. *Madad Lal Ansari vs DCIT – 272 ITR 560 (Raj)*
9. *The appellant shall be highly grateful if the aforesaid grounds are permitted to be urged which had not been raised due to incorrect legal advice.”*

8. With respect to the additional ground, it is assessee's submission that assessee can raise legal additional ground at any stage of proceedings and the additional ground raised by the assessee goes to the root of the matter and therefore the same may be admitted. In support of his contentions, he placed reliance on the decision of Hon'ble Apex Court in the case of National Thermal Power Co. Ltd. reported in 229 ITR 383 (SC).

9. With respect to the additional ground raised by the assessee, we are of the view that since the additional ground goes to the root of the matter and relying on the aforesaid decision of National Thermal Power Co. Ltd. (supra), we admit the additional ground.

10. Before us, Learned AR with respect to the additional ground submitted that in the notice (he pointing to the copy of the notice dated 20.06.2014 which is placed at Page 3 of the paper book), submitted that the AO has not pointed to any specific charge for which the penalty has been levied. He submitted that there is nothing mentioned in the notice as to whether the penalty has been levied for concealment of income or for furnishing of any inaccurate particulars of income and the same is also not evident from the penalty order as well. He submitted that unless there is a specific charge about the limb for which the penalty has been levied, levy of penalty cannot be upheld and the order of levy of penalty is wrong and bad in law. In support of his aforesaid contentions, he placed reliance on the decision rendered in the case of CIT vs. SSA's Emerald Meadows (SC) 73 taxmann.com 248 dated 05.08.2016 and CIT vs. Manjunatha Cotton and Ginning Factory reported in (2013) 359 ITR 565 (KARN). He further submitted that Hon'ble Delhi High Court in the case of PCIT vs. Sahara India Life Insurance Co. Ltd. in ITA No.475/2019 order dated 20.08.2019 has held that the notice issued by the AO to be bad in law if the notice did not specify the limb of Section 271(1)(c) for which penalty has been initiated. He thereafter submitted that identical issue arose in the assessee's own case in A.Y. 2008-09, 2010-11, 2011-12 & 2012-13 before the Co-ordinate Bench of Tribunal and the Co-ordinate Bench of Tribunal has deleted the penalty levied by the AO in identical situation. He pointed to the consolidated order for A.Y. 2010-11, 2011-12 & 2012-13 dated 17.02.2021 which is placed in the paper book. He therefore submitted that since the facts in the

case in the year under consideration are identical to that of earlier years, the matter be decided similarly and penalty be deleted. Learned DR on the other hand supported the order of lower authorities.

11. We have heard rival submissions and perused material on record. The issue in the present ground is with respect to the levy of penalty u/s 271(1)(c) of the Act. The assessee is challenging the levy of penalty u/s 271(1)(c) on the ground that the notice issued does not specify the limb of Section 271(1)(c) for which the penalty has been levied. The perusal of the notice for penalty dated 20.06.2014 issued u/s 274 r.w.s 271(1)(c) of the Act reveals that there is no specific charge has been mentioned by the AO for the levy of penalty. The notice u/s 271(1)(c) does not specify any specific charge viz whether it is a case of concealment of income or a case of filing of furnishing of inaccurate particulars of income. We find that identical issue arose in assessee's own case in A.Y. 2010-11, 2011-12 & 2012-13 before the Co-ordinate Bench of Tribunal and the Co-ordinate Bench of Tribunal by following the order in assessee's own case for A.Y. 2008-09 deleted the levy of penalty by observing as under:

8. We have heard the rival submissions and perused the material on record. The issue in the present ground is with respect to levy of penalty under section 271(1)(c) of the Act. We find that the identical issue arose in the case of the assessee in A.Y. 2008-09 and the Co-ordinate Bench of Tribunal in ITA No. 5088/Del/2017 for A.Y. 2008-09 vide order dated 21.01.2021 has deleted the penalty by observing as under:

“3. Search and seizure action u/s 132(4) of the Income Tax Act, 1961 (hereafter referred to as the “the Act”) was carried

out in the Rockland group of cases on 06.09.2011. Subsequent to the search and seizure action, assessment proceedings were carried out u/s 153C r.w.s. 143(3), by issue of notice dated 05.08.2013 to the appellant to file the return of income. In response, the assessee filed return of income on 10.09.2013, disclosing the total income as NIL. Subsequently, the assessee filed an application for settlement u/s 245C of the Act before the Income Tax Settlement Commission in the capacity of a "related" person, related to the other assessee's of the Rockland group who had also filed settlement applications as "specified person" u/s 245C(i) proviso (i). However, the assessee's application was rejected by the Income Tax Settlement Commission vide their order dated 23.04.2013, wherein the Commission held that the assessee does not qualify for admission as a person "related to" to the "specified person". The assessee filed a writ petition before the Hon'ble Delhi High Court, challenging the rejection order of the Settlement Commission, but the petition was dismissed by the Hon'ble Delhi High Court on 20.10.2015. Meanwhile, the Assessing Officer passed the assessment order making the following additions over and above the income returned by the assessee:

A.Y.	Head of addition	Amount (IN Rs.)
2008-09	(i) Disclosure in settlement application	30,00,000
	(ii) Unexplained cash credits	1,79,56,880/-
	(iii) Commission paid to secure unexplained cash credits	5,38,706/-

The assessee filed appeal against all the above heads of additions. In the appeal against the quantum additions, the following amounts were confirmed in first appeal.

A.Y	Head of addition	Amount (IN Rs.)
2008-09	(i) Disclosure in settlement application	30,00,000
	(ii) Unexplained cash credits	2,26,000/-
	(iii) Commission paid to secure unexplained cash credits	1,79,569/-

After giving effect to the order of CIT(A), the Assessing Officer after providing the assessee an opportunity to show cause as to why

penalty u/s 271(1)(c) should not be levied for concealment of income, and considering the same, rejected the submissions of the assessee and proceeded to levy penalty at the rate of 100% of the tax sought to be evaded on the amounts confirmed in first appeal.

.....

7. We have heard both the parties and perused all the relevant materials available on record. First of all, in the notice issued u/s 274 r.w.s 271(1)(c) of the Income Tax Act, 1961, there was no specific charges as relates to concealment of income or furnishing of inaccurate particulars of income. From the notice dated 20/06/2014 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. Besides that the Assessment Order also did not specify the charge as to whether there is concealment of income or furnishing of inaccurate particulars of income in assessee's case. Besides this, the present case is relating to search conducted by the Revenue in the premises of the assessee, while the decision relied by the Assessing Officer as well as CIT (A) that of Hon'ble Supreme Court in case of Mak Data P. Ltd. vs. CIT 358 ITR 593 is relating to survey and there is no issue involved about the notice issued u/s 271(1)(c) r.w.s. 274 of the Act. This case relied by the Revenue is not applicable in the present case due to the distinguishing facts. There is separate provision for penalty in search cases given under the statute after 01.07.2012 that of Section 271AAB of the Act which was totally ignored by the Assessing Officer. Thus, the penalty itself is based on incorrect Section. Therefore we are taking up the contention of the assessee that there is no particular limb mentioned in the notice issued under Section 271(1)(c) r.w.s. 274 of the Act. This issue is squarely covered by the decision of the Hon'ble Supreme Court in case of M/s SSA' Emerald Meadow. 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."

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.

" 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 submitted that mere nonstriking off of the inappropriate words will not invalidate the penalty proceedings, however, 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 is directly on the issue contested herein by the Assessee. Further, when the notice is not mentioning the concealment or the furnishing of inaccurate particulars, the ratio laid down by the Hon'ble High Court in case of M/s. Sahara India Life Insurance Company Ltd. (supra) will be applicable in the present case. The Hon'ble Delhi High Court held as under:

"21. 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. SSA's 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.”

Thus, notice under Section 271(1)(c) r.w.s. 274 of the Act itself is bad in law. We, therefore, set-aside the order of the CIT(A) and direct the Assessing Officer to cancel the penalty so levied.

9. Before us, no distinguishing feature in the facts of the case in the year under consideration and that of earlier year has been pointed out by the Revenue. Further it has also not brought on record any material to show that the decision of the Co-ordinate bench of the Tribunal in assessee's own case for A.Y. 2008-09 has been set aside/ stayed or over ruled by the higher judicial forum. Considering the totality of the aforesaid facts and following the decision of the Co-ordinate bench in the assessee's own case for 2008-09 and for similar reasons, we are of the view that the levy of penalty u/s 271(1)(c) was not justified. We therefore direct its deletion. Thus the grounds of the assessee are allowed.”

12. Before us, Revenue has not pointed to any distinguishing feature in the facts of the case in the year under consideration and that of the earlier year. Further CIT(A) while deciding the issue had also followed the reasoning of CIT(A) for A.Y. 2009-10. Revenue has also not placed any material on record to demonstrate that the ITAT order in assessee's own case for earlier year has been stayed/ set aside/ overruled by higher judicial forum. We further find that Hon'ble Delhi High Court in the case of PCIT vs. Sahara India Life Insurance Co. Ltd. (2021) 432 ITR

84 (Del) has also deleted the penalty levied u/s 271(1)(c) when the notice did not mention whether the proceedings were initiated for concealment of particulars or for furnishing of inaccurate particulars of income. In such a situation, we for the reasons stated by the Co-ordinate Bench of Tribunal while deciding the issue for earlier years and for similar reasons and relying on the aforesaid decision of Hon'ble Delhi High Court in the case of Sahara India Life Insurance (supra) are of the view that AO was not justified in levying the penalty u/s 271(1)(c) of the Act. We accordingly set aside the levy of penalty levied by the AO and **thus the ground of the assessee is allowed.**

13. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 31.05.2021

Sd/-

**(KULDIP SINGH)
JUDICIAL MEMBER**

Date:-31 .05.2021

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Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

**(ANIL CHATURVEDI)
ACCOUNTANT MEMBER**

ASSISTANT REGISTRAR
ITAT NEW DELHI