

IN THE INCOME TAX APPELLATE TRIBUNAL  
“C” BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT  
AND SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

ITA No. 3395/Bang/2018
Assessment year : 2010-11

Kotarki Construction Pvt. Ltd., # 131/1, Venkatadri Kotarki Building, Gandhi Gunj, Chidri Road, Bidar – 585 401. <b>PAN: AACCK 6097J</b>	Vs.	The Joint Commissioner of Income Tax, Gulbarga Range, Gulbarga.
APPELLANT		RESPONDENT

Appellant by	:	Shri Ravi Shankar, Advocate
Respondent by	:	Shri Elamurugu G., Jt.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	31.08.2021
Date of Pronouncement	:	31.08.2021

**ORDER**

*Per Chandra Poojari, Accountant Member*

This appeal by the assessee is directed against the order of the CIT(Appeals), Gulbarga dated 30.10.2018 for the assessment year 2010-11 on the following grounds:-

- “1. The order passed by the learned assessing officer, under section 271(1)(c) of the Act, is opposed to law, weight of evidence, natural justice, probabilities, facts and circumstances of the Appellant's case.
2. The Appellant denies itself liable to the penalty of Rs. 5,03,278/- levied by the learned assessing officer under

section 271(1)(c) of the Act on the facts and circumstances of case.

3. The notice issued under section 271(1)(c) of the Act, is bad in law, on the facts and circumstances of the case.
4. The learned CIT(A) failed to appreciate that the AO has not assumed proper jurisdiction, as the mandatory conditions for invoking the provisions of section 271(1)(c) of the Act has not been complied with under the facts and circumstances of the case.
5. The CIT(A) failed to appreciate that the AO has not recorded satisfaction in the order of assessment, either for concealment or furnishing inaccurate particulars of income and consequently the order passed is bad in law, on the facts and circumstances of the case.
6. The order passed by the CIT(A) confirming the penalty on the limb of furnishing inaccurate particulars of income is not the limb of penalty levied by the assessing officer and consequently the order is bad in law on the facts and circumstances of the case.
7. Without prejudice, the order passed by the CIT(A) is in violation of the principles of natural justice in respect of confirming the penalty on the limb which was not even invoked in the penalty order of the AO and consequently the order is required to be quashed on the facts and circumstances of the case.
8. The learned CIT(A) failed to appreciate that penal statutes have to be construed strictly on the facts and circumstances of the case.
9. The learned CIT(A) failed to appreciate that the issue of penalty notices under section 274 of the Act, permit the AO to assume jurisdiction over the appellant and was not a mere formality, to be divested with, nor was a curable defect, on the facts and circumstances of the case.

10. The authorities below failed to appreciate that the additions made in the order of assessment order were due to reasons beyond the control of the appellant and since no appeal was preferred against the same, penalty ought not to have been levied, on the facts and circumstances of the case.
11. Without prejudice to the above, the penalty levied is highly excessive and liable to reduced substantially.
12. The appellant craves leave of this Hon'ble Tribunal, to add, alter, delete, amend or substitute any or all of the above grounds of appeal as may be necessary at the time of hearing. For these and other grounds that may be urged at the time of hearing of appeal, the appellant prays that the appeal may be allowed for the advancement of substantial cause of justice and equity.”
2. The assessee in the Return of Income has declared the net taxable income of Rs. 37,35,140/-. The assessee admitted gross total income of Rs. 1,59,68,410/-. After claiming deduction U/s 80IA of the IT Act amounting to Rs. 12233272/- the assessee arrived at net taxable income of Rs.3735140/-. The case was taken up for scrutiny and the scrutiny assessment was completed U/s 143(3) of the I.T. Act on 28.03.2013 determining the net taxable income of RS.8274150/ - after allowing the deduction U/s 80IA of the I.T. Act. The details of additions made were as under:-

Sl No.	Nature of Addition	Rs.
1	Variation in contract receipts	15,91,922/-
2	Undisclosed contract receipts	87,744/-
3	Undisclosed interest receipts	38,20,262/-
4	Unexplained investment in purchases vehicle and furniture	1,68,540/-
5	Variation in sundry creditors	16,94,901/-
6	Disallowance of excess deductions claimed under the head departmental deduction U/s 43B	54,06,759/-

7	Disallowance of Deduction claimed under the head CBF	2,71,454/-
8	Disallowance of excess claim of depreciation	37,487/-
9	Disallowance of depreciation claimed in respect of Guest House	2,19,231/-
10	Disallowance of expenditure U/s 40(a)(ia) of the IT Act in respect of lab testing charges	6,50,565/-
	Total Disallowances	1,05,08,865/-
	Deduction admissible U/s 80IA of the IT Act	189203125/-

3. Accordingly, the AO levied penalty of Rs.5,03,279 observing that the assessee had concealed income by providing inaccurate particulars. On appeal, the CIT(Appeals) confirmed the levy of penalty observing that the assessee deliberately furnished inaccurate particulars with an intention to evade tax. Against this, the assessee is in appeal before us.

4. At the outset, the Id. AR argued that the AO in the penalty notice issued u/s. 274 dated 28.3.2013 mentioned as follows:-

“have concealed the particulars of your Income or “have furnished inaccurate particulars of such Income.””

5. The AO initiated penalty proceedings for levy of penalty for furnishing inaccurate particulars of income. He however levied penalty for concealing the particulars of income which was confirmed by the CIT(Appeals) on the reason of furnishing inaccurate particulars of income. According to the Id. AR, there is variation in initiating the proceedings and levying penalty by the AO and confirmed the levy of penalty by the CIT(Appeals). Hence the penalty has to be deleted on this reason. He relied on the judgment of the Hon'ble Bombay High Court in Mohd. Farhan

A. Shaikh v. DCIT, 125 taxmann.com 253 (Bombay) wherein it was held as follows:-

“ In assessment proceedings, revenue forms an opinion, *prima facie* or otherwise, to launch penalty proceedings against the assessee. But that translates into action only through the statutory notice under section 271(1)(c), read with section 274 . True, the assessment proceedings form the basis for the penalty proceedings, but they are not composite proceedings to draw strength from each other. Nor can each cure the other's defect. A penalty proceeding is a corollary; nevertheless, it must stand on its own. These proceedings culminate under a different statutory scheme that remains distinct from the assessment proceedings. Therefore, the assessee must be informed of the grounds of the penalty proceedings only through statutory notice. An *omnibus* notice suffers from the vice of vagueness.”

6. The Id. AR also relied on the judgment of the Bombay High Court in *CIT v. Samson Perinchery*, 88 taxmann.com 413 (Bombay) wherein it was held as follows:-

“Concealment of income and furnishing of inaccurate particulars of income in section 271(1)(c) carry different meanings/ connotations and, therefore, the satisfaction of the Assessing Officer with regard to only one of the two breaches mentioned under section 271(1)(c) for initiation of penalty proceedings will not warrant/permit penalty being imposed for the other. The order imposing penalty has to be made only on the ground of which the penalty proceedings has been initiated, and it cannot be on a fresh ground of which the assessee has no notice. Therefore, where the Assessing Officer initiated penalty proceedings under section 271(1)(c) for furnishing inaccurate particulars of income, the order imposing penalty for concealment of income was not valid.”

7. On the other hand, the Id. DR relied on the order of CIT(Appeals).

8. We have heard both the parties and perused the material on record. Section 271(1)(c) of the Act has two limbs for levy of penalty;

(i) concealment of particulars of income; and (ii) furnishing inaccurate particulars of income. Being so, it is incumbent upon the AO to state whether penalty was being levied for concealment of income or furnishing inaccurate particulars of income. One limb out of the two must be mentioned by the taxing authority in the notice for levying such penalty. If both limbs have been mentioned in the notice or one irrelevant limb is not struck off by the authority, then it is invalid issue of notice, thereby levy of penalty u/s. 271(1)(c) is not valid.

9. In the present case while issuing notice u/s. 274 on 28.3.2013 the AO observed as under:-

“have concealed the particulars of your Income or “have furnished inaccurate particulars of such Income.””

10. However, he levied penalty vide his order dated 23.9.2013 for concealment of income for which there was no mention in the notice u/s. 274 of the Act. On the other hand, the CIT(Appeals) confirmed the levy of penalty by observing that the assessee has deliberately furnished inaccurate particulars of income with an intention to evade tax and consequently the levy of penalty is justified. As held by the Bombay High Court in *CIT v. Samson Perinchery (supra)*, the order of imposition of penalty has to be made only on the ground of which the penalty proceedings has been initiated and it cannot be on a fresh ground of which the assessee has no notice. Therefore, where the AO initiated penalty proceedings u/s. 271(1)(c) of the Act for furnishing inaccurate particulars of income, the order imposing penalty for concealment of income was not valid. In the present case, the penalty was initiated for furnishing inaccurate particulars of income, however penalty is levied by the AO for concealment of income. Further, the CIT(Appeals) confirmed the penalty on the reason of furnishing inaccurate particulars of income. Being so, there is a defect in issue of notice and levy of penalty by the AO and

confirmation of penalty by the CIT(Appeals), which invalidates the levy of penalty u/s. 271(1)(c) of the Act. Accordingly, we quash the penalty order on this ground in this case.

11. Since we have allowed the legal ground of the assessee, we refrain from going into other grounds of appeal raised by the assessee.

12. In the result, the appeal by the assessee is allowed.

Pronounced in the open court on this 31<sup>st</sup> day of August, 2021.

Sd/-

Sd/-

( N V VASUDEVAN )  
VICE PRESIDENT

( CHANDRA POOJARI )  
ACCOUNTANT MEMBER

Bangalore,  
Dated, the 31<sup>st</sup> August, 2021.

*/Desai S Murthy/*

Copy to:

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

By order

Assistant Registrar  
ITAT, Bangalore.