

अपीलीय अधिकरण, इन्दौर न्यायपीठ, इन्दौर

**IN THE INCOME TAX APPELLATE TRIBUNAL  
INDORE BENCH, INDORE**

**BEFORE SHRI MANISH BORAD, ACCOUNTANT MEMBER  
AND**

**Ms. MADHUMITA ROY, JUDICIAL MEMBER**

**Virtual hearing**

**ITA No.85/Ind/2020**

**Assessment Year:2013-14**

DCIT(Central)-2 Indore	<u>बनाम/</u>	M/s. Kalyan Toll Highway Pvt. Ltd. Indore
(Appellant)	Vs.	(Revenue )
P.A. No. AADCK9401F		

Appellant by	Shri Harshit Bari, Sr. DR
Respondent by	Shri Ajay Tulsian, CA
<b>Date of Hearing:</b>	<b>21.06.2021</b>
<b>Date of Pronouncement:</b>	<b>27.07.2021</b>

**आदेश / O R D E R**

**PER MANISH BORAD, A.M:**

The above captioned appeal filed at the instance of the Revenue for Assessment Year 2013-14 is directed against the orders of Ld. Commissioner of Income Tax(Appeals) (in short 'Ld. CIT], Bhopal dated 07.11.2019 which are arising out of the penalty order passed

u/s 271(1)(c) of the Act dated 25.05.2018 framed by DCIT(Central) Circle-II Indore, raising following ground of appeal:

*“On the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the penalty of Rs.60,00,000/- levied by the Assessing Officer for furnishing of inaccurate particulars of income in respect of bogus claim of expenses of Rs.1,83,32,0378/- capitalized for the A.Y.2013-14 having tax effect in subsequent years, without appreciating the findings of the assessing officer in the penalty order passed u/s 271(1)(c) of the Income Tax Act, 1961.”*

2. Brief facts as culled out from the records are that assessee is a Private Limited Company. Search & seizure operations u/s 132 of the Act were carried out at various premises of Kalyan Group of Indore on 04.09.2015 which included the assessee company also. Assessment proceedings u/s 143(3) r.w.s. 153A were completed on 29.11.2017 for the year under appeal. Ld. AO observed that assessee has booked bogus purchase of bitumen of Rs.1,83,38,032/-. This amount was not claimed as an expenditure but was part of the project cost shown as work-in-progress. Depreciation on this project cost was claimed from A.Y. 2015-16 onwards which were subsequently revised by reducing the claim of depreciation by filing revised return of income. However, for A.Y.

2013-14 no addition was made for alleged amount of Rs.1,83,32,038/- but penalty proceedings for u/s 271(1)(c) of the Act were initiated. Ld. AO issued show cause notice to the assessee on 29.11.2017 and carried out the penalty proceedings and after considering the submissions of the assessee levied the penalty at Rs.60,00,000/- u/s 271(1)(c) of the Act for furnishing inaccurate particulars of income.

3. Aggrieved assessee preferred an appeal before the Ld. CIT(A) raising grounds on merits as well as legal grounds. The Ld. CIT(A) decided in favour of assessee. Firstly he allowed the legal grounds by relying on the judgment of Hon'ble jurisdictional High Court in the case of *Pr. CIT vs. Kulwant Singh Bhatia dated 09.05.2018 in ITNo.9 to 14/2018* on observing that since specific charge was not leveled against the assessee in the show cause notice penalty proceeding were void and thus no penalty should have been levied. On merits also assessee was able to succeed since no addition was made to the income of assessee by the Ld. AO and as the penalty is computed on the tax levied on the additions made, no such penalty was leviable by the Ld. AO u/s 271(1)(c) of the Act.

4. Now the revenue is in appeal before this Tribunal. Ld. Departmental Representative(DR) vehemently argued supporting the order of Ld. AO.

5. Per contra Ld. counsel for the assessee heavily relied on the finding of ld. CIT(A). Reference was also made to the paper book running from pages 1 to 72. It was also contended that show cause notice issued on 29.11.2017 u/s 274 r.w.s. 271(1)(c) of the Act is defective and thus in view of the ratio laid down by Hon'ble jurisdictional High Court in the case of *Pr. CIT vs. Kulwant Singh Bhatia (supra)* penalty proceedings becomes *void ab initio*. On merit it was contended that the alleged amount of bogus purchase of bitumen was never claimed as an expenditure during the year. It was a part of the project cost subject to depreciation which was claimed for A.Y. 2015-16 onwards. The excess depreciation claim was also withdrawn by filing revised returns. Since no addition was made for year under appeal, no penalty could have been levied.

6. We have heard rival contentions and perused the records placed before us and carefully gone through the decisions referred by the ld. CIT(A) in the impugned order. Revenue's sole grievance is against the

finding of Ld. CIT(A) deleting the penalty levied u/s 271(1)(c) of the Act at Rs.60,00,000/- for the alleged furnishing of inaccurate particulars of income in respect of bogus claim of purchase expenses of Rs.1,83,32,038/-.

7. We note that during the A.Y. 2013-14 assessee has capitalized certain amount towards a project cost which was subject to depreciation from A.Y.2015-16 onwards. There was an issue of claim of bogus purchase of bitumen at Rs.1,83,32,038/-. It is not in dispute that this amount was not claimed as an expenditure during the year. It was a part of project cost. Depreciation on this project was to be claimed from A.Y. 2015-16. No addition for this amount was made by the ld. AO for the year under appeal. The assessee has revised the returns for A.Y. 2015-16 and onwards for withdrawing the excess claim of depreciation so made. Though there is no addition made by the Ld. AO, the alleged penalty proceedings were initiated and subsequently levied for the alleged claim of bogus expenditure.

8. We also note that for initiating penalty proceedings following show cause notice was issued u/s 274 r.w.rt. 271(1)(c) of the Act :

OFFICER OF THE DEPUTY COMMISSIONER OF INCOME TAX (CENTRAL)-2,  
INDORE

PAN:AADCK9401E

TO,

M/s. Kalyan Toll Highways Pvt. Ltd.,  
15/3, Vidhyadeep, Manoramaganj  
Indore

Sir,

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

Whereas in the course of proceedings before me for the assessment year 2013-14 it appears to me that you:-

\*Have without reasonable cause failed to furnish the 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 in 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 Ad, 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 11.30 AM on 14.12.2017 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 yourself of this opportunity of being heard in person or through 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\(1\)\(c\)](#).

Sd/-

(Vinita Dubey)

*Deputy Commissioner of  
Income Tax Central Circle -2,  
Indore*

9. From perusal of the above show cause notice we observe that both the charges i.e. considering the particulars of income and furnishing of inaccurate particular of income have been leveled against the assessee. It is not clear as to for which charge the penalty proceedings have been initiated. As per the principles of natural justice assessee deserves to be show caused for the specific default which in the instant case is not clear from above referred show cause notice.

10. We further note that Ld. CIT(A) after appreciating the fact on merits held that penalty is not leviable as no addition was made and on legal ground assessee's case is covered by the judgment of jurisdictional High Court in the case of *Pr. CIT vs. Kulwant Singh Bhatia (supra)* deleted the impugned penalty observing as follows:

*5.1 Ground No.1 & 2 - Through these ground of appeal, the appellant has challenged the levy of penalty of Rs. 60,00,0001- U/S 271(1)(c) of the Income Tax Act and also the initiation of the penalty proceedings uls 271(1)(c) and also the penalty show cause notice issued uls 274.*

*5.1.1 It is seen that the appellant filed its return of income uls 139(1) on*

01.10.2013 declaring nil income. In response to notice issued U/S 153A, the appellant filed the return on 25.08.2016 declaring Nil income. The AO completed the assessment on 29.11.2017 on an income of Rs. 1,79,725/- by making a nominal addition of Rs. 1,79,725/-. In the assessment order, the AO initiated penalty u/s 271(1)(c). The AO also issued a notice u/s 274 r.w.s. 271(1)(c) dated 29.11.2017 stating that the appellant has concealed the particulars of income or furnished inaccurate particulars of income. After considering the reply of the appellant, the AO passed the impugned penalty order u/s 271(1)(c) on 25.05.2018 levying a penalty of Rs. 60,00,000/- for this year.

5.1.2 During the search on the appellant it was found that the appellant has booked bogus bills of Rs. 1,83,38,038/- for inflating its project cost during AY 2013-14. The appellant has capitalized this amount in its books of accounts in the cost of the project. The AO has stated in Para 2.2 of the penalty order that the amount of Rs. 1,83,32,038/- was debited to the cost of the project and therefore, the project cost was inflated by this amount. The toll period was 25 years which started in A Y 2015-16 and therefore, the appellant withdrew its claim of amortization of the cost of the project, in respect of the inflated project cost, in the ITRs of A Y 2015-16 and A Y 2016-17 which were revised u/s 139(5) during the assessment proceedings. The AO further noted that in respect of excess amortization claimed on enhanced project cost of Rs. 1,83,32,038/-, the appellant withdrew the claim of Rs. 6,44,236/- and Rs. 8,51,408/- for AY 2015-16 and AY 2016-17 respectively. The AO also noted in Para 2.3 that the appellant has furnished inaccurate particulars and concealed income to the extent of Rs. 1,83,32,038/- through claim of bogus expenditure on account of purchase of

*Bitumen and then inflated the project cost and concluded that the appellant had made a wrong claim on account of expenditure incurred against cost of the project under consideration and is in default for furnishing inaccurate particulars of such income and levied a penalty of Rs. 60,00,0001- U/S 271(1)(c).*

*5.1.3 The appellant has challenged the initiation of the penalty proceedings on the contention that the notice issued under section 274 was a defective notice as no specific charge was mentioned against the appellant. The appellant has challenged the levy of penalty U/S 271 (1)( c) on the ground that there was no satisfaction in the penalty order as well, as both the charges were reiterated in the penalty order. It is also contended that the penalty order is vague and wrong as the AO has invoked Explanation 1 to section 271(1)(c) as referred in Para 3.1.2 of the penalty order, which is not at all applicable in cases of search and seizure. It is also submitted by the appellant that the inflated project cost of Rs. 1,83,32,0381- was capitalized to the cost of the project in this year and proportionate deduction on account of amortization depreciation was claimed only from A Y 2015-16 onwards, which claim was also withdrawn by the appellant in A Y 2015-16 and A Y 2016-17 by filing a revised return and has not made this claim in the returns filed u/s 139(1) for A Y 2017-18 onwards. The appellant has also contended that it is an undisputed fact that it has not claimed any deduction of Rs. 1,83,32,038/- or any part thereof in the impugned assessment year and no addition on this account has been made by the AO in this year, therefore, the penalty u/s 271(1)(c) cannot be levied on this account. Finally the appellant contended that since no addition made has been made on this issue in the year under consideration, no penalty u/s*

*271(1)(c) ought to have been levied.*

*5.1.4 After taking into consideration the assessment order and also the penalty order and all the contentions of the appellant carefully, it is seen that the amount of Rs. 1,83,32,038/-, which was found to be merely bills procured by the appellant, was debited by the appellant to the capital work in progress I cost of the project under construction in this year. The said project was not completed in this year and therefore, no income was earned and no deduction was claimed by the appellant. The said project was completed in A Y 2015-16, when the first profit and loss account was prepared and income was offered and proportionate deduction of cost of the project was claimed. All these facts are not disputed in the assessment order and also in the penalty order. The AO has also not made any addition on account of inflated project cost to the returned income of this year, nor any part of the same has been disallowed and there is no impact on the income of this year on account of any adjustment on this issue. Therefore, penalty u/s 271(1)(c) ought not to have been levied by the AO in respect of the inflated project cost of Rs. 1,83,32,0381- in this year.*

*5.1.5 It is also seen that the impugned project was commenced in A Y 2015-16 and the proportionate cost of the project was claimed as deduction for the first time in AY 2015-16 against the income earned from the said project. The appellant has withdrawn its claim of proportionate deduction on the inflated project cost in AY 2015-16 and AY 2016-17 by filing the revised returns for these years, which fact is also mentioned in the assessment order as well as in the penalty order. The AO has also levied separate penalties U/S 271AAB for both these assessment years in respect of the claim of depreciation on inflated project cost withdrawn by the appellant, it is therefore, rightly contended by the appellant that the AO has levied the penalty u/s 271(1)(c) twice in respect of the same issue, once in AY 2013-14 on the entire inflated project cost and second time in AY 2015-16 and AY*

2016-17 in respect of the proportionate claim of inflated project cost withdrawn by the appellant. This action of the AO is also not justified. Since the appellant has not claimed any deduction in this year and the AO has also not made any addition in this year, penalty U/S 271(1)(c) cannot be levied on the appellant for this year.

5.1.6 It is also seen from the notice dated 29.11.2017 issued u/s 274 which is at page 34 of the paper book, that both the charges i.e. concealment of particulars of income or furnishing inaccurate particulars of income are mentioned therein. Similarly a perusal of the penalty order shows that again both the charges are mentioned in para 2.3, para 3.1.2 and also in concluding para 3.1.7 of the penalty order. As per the provisions of section 271 (1)( c) of the Act, there are two different charges i.e. the concealment of particulars of income or furnishing of inaccurate particulars of income. Penalty can be imposed for a specific charge. In view of the decision of Honourable Supreme Court in the case of T. Ashok Pai Vis CIT (2007) 292 ITR 11 (SC) it is now a settled proposition that concealment of income and furnishing inaccurate particulars of income carry different connotation. It is equally settled proposition that where the charge for levying penalty is not specific, the notice U/S 271 (1)( c) is bad in law as it does not mentioned the specific limb of section 271(1)(c) of the Act under which it has been initiated. When the notice does not specify the charge for levy of penalty, it has been held that the penalty cannot be levied. The Hon'ble Supreme court in Dilip N. Shroff Vis JCIT (2007) 291 ITR 519 (SC), has observed that while issuing the notice under section 274 r.w.s. 271, in the standard format, the Assessing Officer should delete the inappropriate words or paragraph, otherwise, it may indicate that the Assessing Officer himself was not sure as to whether he had proceeded on the basis that the assessee had concealed his income or had furnished inaccurate particulars of income. The Honourable Court further observed that the AO has not struck down the relevant word sentence in the cyclostyled proforma of the penalty show cause notice, therefore, the AO was not sure that on what ground he is levying the penalty.

5.1. 7 *The penalty notice was issued in mechanical manner without specifying the specific charge as to whether the appellant is found guilty of concealing the particular of income or have furnished inaccurate particulars of income. Thus the very initiation of the penalty proceeding in this case is not in accordance with law and has led to vitiation of entire penalty proceedings. Very recently the Hon'ble jurisdictional High Court in the case of Principal Commissioner of Income Tax vis Kulwant Singh Bhatia dated 09.05.2018 (ITA 9 to 14 of 2018) has held that the penalty u/s 271(1)(c) of the Act of 1961 is not sustainable in law as the notice was not specific, observing as follows:-*

*"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 Learned Tribunal has rightly relying on the decision of CIT Vis Manjunatha Cotton Ginning Factory and CIT Vis SSA'S Emerald Meadows 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) 912018, 10/2018, 11/2018, 12/2018, 13/2018 and 14/2018, filed by the appellant have no merit and are hereby dismissed.*

5.1.8 *It is observed that facts of the present case under appeal before me are identical to that of the case of Kulwant Singh Bhatia (Supra) in so far as additional income was offered by the assessee in the returns filed after the search and penalties u/s 271(1)(c) were levied on the basis of show cause notice issued without striking off either of the two charges which facts are identical in the present appeal. In the case of Kulwant Singh Bhatia also, it was the observation of the AO that the assessee has offered additional income only due to search and the additional income was not declared in the return filed u/s 139 and therefore, penalty proceedings U/S 271(1)(c)*

*were initiated, which fact is also identical with the present appeal. In the case before the Honourable High Court, the penalties were deleted by the Tribunal holding that the same as not sustainable in law, as no specific charge was levied in penalty show cause notice, later the order of the Honourable IT AT was affirmed by the Honourable Jurisdictional High court. Therefore, the proposition laid down by the Honourable Jurisdictional High Court of Madhya Pradesh is applicable in the present appeal also and it is held that the penalty proceedings initiated in this case are not as per law and the penalty so levied is wrong.*

*5.1.9 The appellant has stated that in its other group cases also, wherein penalties were levied u/s 271 (1)( c) in the assessment proceedings carried out as a result of the search, and penalty proceedings were initiated in an identical manner, in which the same were initiated in the present appeal, have been deleted by the Honourable ITAT Indore Bench in the cases of Mis Ketis Sangam Infrastructure (I) Ltd. and other group company appeals and also in the case of Shruti Garg and other individual cases of the group, copies of such orders have also been filed at page no. 31 to 53 and at page no. 08 to 30 respectively of the case law paper book. A perusal of the order passed in the case of Ketis Sangam Infrastructure (I) Ltd. in IT no. 516/Ind12017 and other cases by the Honourable Jurisdictional ITAT on 27.06.2018 it is seen that the penalties levied u/s 271(1)(c) of the Act has been deleted. After discussing the issue at length and after analyzing the various decisions, the Honourable ITAT in Para 13 on internal page 32 of the order held that;*

*"From the perusal of the above judgment and examining the facts of the instant nine appeals, we find that in all these cases the Assessing Officer has not struck down the relevant word from the sentence in the cyclostyled proforma of penalty show cause notice which means that the Assessing Officer was not sure as to on what ground he has initiated the penalty proceedings and in such a case the alleged notice is not sustainable in law and is liable to be quashed. Be, therefore, respectfully*

*following the judgments and decisions referred to above, allow this common legal ground of the assessee's in these nine appeals and delete the penalties levied u/s 271 (l)(c) of the Act in all these cases. "*

*Therefore, following the decision of the Honourable IT A T Indore Bench rendered on 27.06.2018 in the appellant group cases itself, it is held that the penalty levied by the AO in the impugned order is invalid.*

*5.1.10 Further, the appellant has rightly contended that no proper satisfaction has been drawn in the penalty order, where Explanation 1 of section 271(1)(c), has been invoked and the appellant has been held to be guilty of concealment of income and also furnishing inaccurate particulars of income, which is also not in accordance with law. Explanation 1 of section 271(1)(c) cannot be invoked in the search cases*

*5.1.11 The appellant also get support from the decision of Honourable M. P. High Court which has also been upheld by the Honourable Supreme Court in the case of CIT Vis Suresh Chand Mittal (2001) 251 ITR 9, wherein it was held that where the assessee filed revised return showing higher income after search and notice for reopening of assessment and the department simply rested its conclusions on the action of surrender made by the assessee, no penalty u/s 271(1)(c) could be levied. Though in the present appeal before me, the AO has not made any addition, on the issue on which penalty has been levied and only a nominal addition of Rs.1,79,725/- was made u/s 69C of which no penalty was levied. For this reason also the penalty levied u/s 271(1)(c) in the present appeal is held to be wrong.*

11. We have carefully gone through the detailed finding of facts by Ld. CIT(A) as well as reliance placed by him on settled judicial

precedence and thus in the totality of facts and settled legal position as held by Hon'ble jurisdictional High Court in the case of *Pr. CIT vs. Kulwant Singh Bhatia (supra)* and also in view of decision of this Tribunal in other group concerns of the assessee, find no reason to interfere in the finding of Ld. CIT(A) deleting the penalty levied u/s 271(1)(c) of the Act by the Ld. AO. Thus, finding of Ld. CIT(A) is confirmed. The Revenue fails to succeed and the sole ground raised by the revenue is dismissed.

12. In result, appeal filed by the revenue in ITA No.85/Ind/2020 is dismissed.

Order was pronounced as per Rule 34 of the I.T.A.T. Rules 1963 on 27.07.2021.

Sd/-  
(MADHUMITA ROY)  
JUDICIAL MEMBER

Sd/-  
(MANISH BORAD)  
ACCOUNTANT MEMBER

Indore; दिनांक Dated : 27/07/2021

Patel/PS

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order

**Assistant Registrar, Indore**