

THE INCOME TAX APPELLATE TRIBUNAL
"A" Bench, Mumbai
Shri Shamim Yahya (AM) & Shri Pavankumar Gadale (JM)

I.T.A. No. 2942/Mum/2019 (Assessment Year 2012-13)

M/s. ARC Associates 1, Mittal Co-op.Hsg. Society Near Saffron Hotel Karjat Road, Kulgaon-E Badlapur, Maharashtra Pincode-421 503. PAN : AAQFA9112K (Appellant)	Vs.	ACIT, Circle-2 2 nd Floor Mohan Plaza Wayale Nagar Khadakpada Kalyan-W Pincode-421306. (Respondent)
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Assessee by	Shri Satyaprakash Singh
Department by	Shri Brajendra Kumar
Date of Hearing	07.07.2021
Date of Pronouncement	12.07.2021

ORDER

Per Shamim Yahya (AM) :-

This is an appeal by the assessee directed against the order of learned Commissioner of Income Tax (Appeals) [in short learned CIT(A)] dated 22.11.2018 pertains to assessment year 2012-13.

2. Grounds of appeal read as under :

1. The order dated 22/11/2018 bearing No. 10809-THN-15-16 passed under section 271[l][c] by the Hon'ble CIT[A]-3, Thane, is excessive, unreasonable, arbitrary, against the provisions of Income Tax Act, 1961 and therefore liable to be quashed.
2. The delay in filing of present appeal may kindly be condoned and appeal may be decided accordingly.
3. On facts and circumstances of the case and in law, the Hon. C.I.T.(A) has erred in directing the Assessing Officer to levy of penalty under section 271[l][c] of the Income Tax Act, 1961.

3. Brief facts of the case are that in this case the Assessing Officer has passed an assessment order under section 143(3) of the I.T. Act vide order dated 25.3.2015. In the assessment order the Assessing Officer made an

addition of Rs. 7,90,595/-. The Assessing Officer was of the opinion that the assessee has wrongly deferred the said income in A.Y. 2014-15. The Assessing Officer further was of the opinion that the assessee has followed two different methods to recognize the revenue on one building project.

4. The assessee appealed against this order before learned CIT(A). Learned CIT(A) has noted the date of institution of appeal is dated 20.4.2015. The grounds of appeal that were raised by the assessee were as under :-

“1) The learned A.C.I.T. has erred in law, & on facts, while making an addition of Rs. 7,90,595/- to our returned income. The said amount is me estimated amount of profit related to that part of our construction work, which had done a negligible progress in the F.Y. 2011-12 & which is thereafter correctly offered to Income Tax in subsequent financial year/s in the returns already filed by us.

We pray that the said addition be deleted entirely

2) The Assessment Order passed by the learned A.C.I.T. is passed mechanically, without application of proper mind & in an entirely adhoc manner. It is therefore, & and even otherwise, bad in law.

We pray that the said order be therefore set aside

3) We pray that we shall be allowed to add to the above grounds, delete any of the above grounds or amend any of them.”

5. Learned CIT(A) in his order noted that section under which order appealed against which was made under section 271(1)(c) of the Act. Learned CIT(A) also captioned his order under section 271(1)(c) of the Act. In this case learned CIT(A) noted the facts of the case as per assessment order. Thereafter he noted that during the course of appellate proceedings appellant filed a letter dated 13.3.2018 for withdrawal of the appeal. Learned CIT(A) thereafter noted that before acceptance of withdrawal of the appeal appellant was requested to furnish details vide letter dated 15.3.2018. He reproduced the contents of the letter in which he acknowledged the receipt of a letter dated 13.3.2018 by the assessee for withdrawal of the appeal. In the said letter assessee was requested to furnish the profit and loss account for A.Ys. 2011-12, 2012-13, 2013-14 & 2014-15 and also work out the profit on the basis of percentage completion

method in respect of buildings bearing Nos. A,B,C & D wings. It was also stated that the information called for should reach in this office on or before 22.3.2018. Referring to the percentage of profits in those years learned CIT(A) opined that the profit in the present year is very low. Hence, he issued a notice for enhancement of income under section 251(2) of the Act on 13.4.2018. In the said notice he proposed that as to why net profit should not be estimated @ 20% on the sales as well as on the work-in-progress. That the reasons for low GP may be submitted and also show-cause as to why the book results under section 145(3) of the Act should not be rejected. He noted the assessee's response as under :-

“With reference to above matter we on behalf of our client do hereby request you to kindly consider the following facts

1. ARC Associates is a Partnership Firm engaged in construction of residential complexes.
2. The said firm is showing average profit of 15.37% from last seven years. The sheet is enclosed herewith for your reference.
3. Since construction is located in a rural place of Badlapur, the average income customers are purchasing flats.
4. The project got affected due to local municipal authorities delay in issuing permissions due to TDR scam in Badlapur Nagar Palika.
5. Considering the trend of profit in construction line of Badlapur, our client has been shown good profit.

We once again request you to kindly take all these facts on record & allow us to withdraw appeal. We once again request you to not to enhance profit as we have already shown a good profit.”

6. Learned CIT(A) held that the profit assessed for A&D wings is definitely on the lower side and therefore profit is enhanced. He proceeded to enhance the assessment by estimating the net profit for A&D wings and determined @ 15.37% which resulted in figure of Rs. 22,29,697/-. Thus learned CIT(A) upheld the income added by the Assessing Officer and further enhanced the income by Rs. 14,39,102/-. Thereafter learned CIT(A) noted that in view of the above said enhancement notice was issued to the assessee to show-cause as to why penalty under section 271(1)(c) of the Act should not be

imposed for furnishing of inaccurate particulars of income. He noted that assessee sought several adjournments. Learned CIT(A) referred to the provisions of section 271(1)(c) of the Act read with Explanation (1) of the Act. He concluded as under :-

“During the appellate proceedings, had this issue not been considered, to the suppressed income of Rs.14,39,102/- would have not been detected. in view of these facts, it is held that the appellant had evaded the tax/suppressed his income, by filing inaccurate particulars, to this extent. Accordingly, I am satisfied that without any sufficient and reasonable cause the appellant had committed default, by furnishing inaccurate particulars defined u/s271(l)(c) of the IT Act.

Keeping in view the facts as discussed above, in my considered opinion, it is fit case for levy of penalty u/s. 271(l)(c) of the IT. Act, 1961. Accordingly, the AO is hereby directed to levy a minimum penalty (on enhanced income), being 100% tax sought to be evaded, as per provisions of explanation 4 to sub section (1) of section 271 of the Act by determining the same. He is also directed to issue the necessary penalty order/notice of demand and challan, accordingly.”

7. Against this order assessee is in appeal before us. We have heard both the parties and perused the records. Firstly we note that before learned CIT(A) there was an appeal against the order passed by the Assessing Officer under section 143(3) of the Act. Grounds of appeal were also raised in connection with addition done by the Assessing Officer. Learned CIT(A) chose to note that section under which order appealed against was made under section 271(1)(c) of the Act and he captioned his order under section 271(1)(c) of the Act. From the facts on record above this is absolutely incorrect and wrong description. Thereafter in the said order learned CIT(A) noted that the assessee has sought withdrawal of appeal vide letter dated 13.3.2018. The Ld.CIT(A) gave no reason as to why he is not permitting to withdraw the appeal. Subsequent to withdrawal of the appeal learned CIT(A) issued notice for further particulars and enhancement. Here we note that learned CIT(A) has grossly erred in not recording any reason as to why he is not permitting the assessee to withdraw the appeal. Thereafter learned CIT(A) has proceeded as if he is sitting in revision of the order u/s 263 and he has done enhancement. Enhancement is also on a very absurd reasoning that the GP is very low. Reasoning adduced by

the assessee has totally been ignored. Just because the GP rate is low as compared to earlier years that is not conclusive proof that income is suppressed. Hon'ble Punjab & Haryana High Court in the case of Commissioner of Income Tax Vs. Ajay Kumar Singla (ITA No. 181 of 2014 dated 7 October, 2014) has held that lower GP may be cause for investigation but that is not the cause for increase in the assessment. Hence, this limb of learned CIT(A)'s decision is totally devoid of cogency and the same is liable to be quashed. Thereafter learned CIT(A) has proceeded to issue notice under section 271(1)(c) of the Act. Before issue of notice we note that in the portion where he is making enhancement there is no findings whatsoever that assessee is guilty of furnishing of inaccurate particulars of income or concealment of income. Without giving any such finding in the assessment portion of his order he has proceeded to issue notice for furnishing of inaccurate particulars of income. We note that there is no mention whatsoever as to what are inaccurate particulars furnished by the assessee. An assessment based upon low GP without recording any reason of inaccurate particulars involved is not sustainable. Thereafter learned CIT(A) has given direction to the Assessing Officer to levy penalty equivalent to 100% tax under section 271(1)(c) of the Act. Mere estimate of income cannot fasten liability upon the assessee u/s.271(1)(c) of the Act. In Reliance petro products, it was held that mere disallowance cannot ipso facto fasten liability u/s.271(1)(c) of the Act.

8. Further, it is settled law that learned CIT(A) has no power whatsoever to remit the matter to the Assessing Officer to pass a penalty order as per his direction. In this view of the matter order of learned CIT(A) is perverse and is liable to be quashed.

9. In the background of the aforesaid discussion and precedent we quash the entire order passed by learned CIT(A). the Assessing Officer is directed not to give effect or follow any of the limb of the adjudication of the learned CIT(A)

as above as we have already found that order of learned CIT(A) to be perverse and having no legal basis.

10. In the result, appeal filed by the assessee stands allowed.

Pronounced in the open court on 12.07.2021

Sd/-
(PAVANKUMAR GADALE)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 12/07/2021

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

PS

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai

S.No	Description	Date	Intls	
1	Prepared by SY/dictation pad enclosed	8.7.2021		
2	Draft dictated on	8.7.2021		Sr.P.S.
3	Draft placed before author	8.7.2021		Sr.P.S.
4	Draft proposed & placed before the second Member			JM/AM
5	Draft discussed/approved by second Member			JM/AM
6	Approved Draft comes to the Sr.P.S./PS			Sr.P.S.
7.	Kept for pronouncement on	.7.2021		Sr. P.S.
8.	File sent to the Bench Clerk	.7.2021		Sr.P.S.
9	Date on which file goes to the Head Clerk			
10	Date of Dispatch of order			