

आयकर अपीलिय अधिकरण "बी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER
AND
SHRI S.S. VISWANETHRA RAVI, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.867/PUN/2018

निर्धारण वर्ष / Assessment Year : 2013-14

The Dy. Commissioner of Income Tax,
Circle – 3, Pune

.....अपीलार्थी / Appellant

बनाम / V/s.

M/s. Gokhale Sabade Associates
Office No.2 and 10,
Nirmitee Eminance,
1175/1, Erandwane,
Pune – 411004

PAN: AAJFG2290H

.....प्रत्यर्थी / Respondent

Assessee by : Shri C.V. Deshpande
Revenue by : Shri S.P. Walimbe

सुनवाई की तारीख / Date of Hearing : 26-10-2021

घोषणा की तारीख / Date of Pronouncement : 26-10-2021

आदेश / ORDER

This is an appeal filed by the Revenue directed against the order of Ld. Commissioner of Income Tax (Appeals)-3, Pune, dated 14.02.2018 deleting the penalty of Rs.62,54,166/- levied u/s 271(1)(c) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') for A.Y. 2013-14.

2. The Revenue has raised the following grounds of appeal:

1. On the facts and circumstances of the case, the Ld. CIT(A) has erred in deleting the penalty levied u/s 271(1)(c) of the I.T. Act of Rs.62,54,166/-, without appreciating the fact that the assessee **disclosed unaccounted income of Rs.2.02 crores during the survey action u/s 133A of the Act**, conducted on the assessee.

2. On the facts and circumstances of the case, the Ld. CIT(A) failed to appreciate the fact that the disclosed unaccounted income **was never part of books of accounts** of the assessee and had there been no survey action on the assessee, the income of Rs.2.02 crores **would have escaped assessment**. Therefore, the income declared in the return filed after the date of survey, **cannot be considered as 'voluntary'**.

3. On the facts and circumstances of the case, the Ld. CIT(A) erred in deleting the penalty without appreciating the decision of Hon'ble Supreme Court in the case of **MAK Data Pvt. Ltd. Vs CIT [2013] 358 ITR 593 (SC)** wherein offer of surrender of amount after detection by Assessing Officer in search conducted was not considered as being voluntary in nature and the apex court justified levying of penalty u/s 271(1)(c).

3. Briefly, the facts of the case are as under:

The respondent assessee is a partnership firm engaged in the business of builders. The return of income for the assessment year 2013-14 was filed on 29.03.2014 declaring total income of Rs.2,02,40,024/-. The assessment against the said return of income was made u/s 143(3) of the Act by the Assessing Officer vide order dated 21.03.2016 accepting the returned income. However, the AO also initiated penalty proceedings u/s 271(1)(c) of the Act by issuing show cause notice u/s 274 of the Act.

4. The brief background of the case is as under:

A survey operation was conducted u/s 133A of the Act in the business premises of respondent assessee firm on 11.10.2012. It is stated that as a consequence of such survey operation it was found that the respondent assessee firm received on-money consideration on sale of flats of Rs.2,02,40,024/-. During the course of survey operation, a statement on oath was recorded from the partner of assessee firm namely Shri

Manish Sabade admitting receipt of on-money of Rs.2,02,40,024/-. The income admitted during the course of survey operation was declared in the return of income filed on 29.03.2014, which is belated return. The AO formed an opinion that but for the survey operation the receipt of on-money of Rs.2,02,40,024/- would not have been disclosed in the return, accordingly, initiated penalty proceedings u/s 271(1)(c) of the Act for concealment of income. Accordingly, a show cause notice u/s 274 r.w.s. 271(1)(c) of the Act was issued on 21.03.2016, in response to which, it was explained that no penalty is leviable as there is no variation between the returned income and assessed income. However, the AO rejecting the above explanation held that the respondent assessee is guilty of concealment of income, as the receipt of on-money would not have been disclosed in the return of income but for the survey operation. The AO placing reliance on the decision of Hon'ble Supreme Court in the case of MAK Data Pvt. Ltd. Vs. CIT, October 31, 2013 (Date of publication) had levied penalty of Rs.62,54,166/- vide order dated 30.09.2016 u/s 271(1)(c) of the Act.

5. Being aggrieved by the above penalty order, an appeal was preferred before the Ld. CIT(A), who vide impugned order held that the ratio of the decision of the Hon'ble Supreme Court in the case of MAK Data Pvt. Ltd. Vs. CIT (supra) is not applicable to the facts of present case as there is no variation between the returned income and assessed income and applying the decision of Hon'ble Delhi High Court in the case of CIT Vs. SAS Pharmaceuticals, 11 taxmann.com 207 (Del) and the Hon'ble Madras High

Court in the case of CIT vs. Smt. Anita Kumaran 2017-(IT2)-GJX-0083-MAD had deleted the penalty.

6. Being aggrieved, the Revenue is in appeal in the present appeal.

7. The ld. Sr. CIT-DR Shri S.P. Walimbe submitted that the ld. CIT(A) ought to have applied the ratio of decision of Hon'ble Supreme Court in the case of MAK Data Pvt. Ltd. Vs. CIT (supra) as the assessee would not have detected the income on account of receipt of on-money but for the survey operation.

8. On the other hand, the ld. AR Shri C.V. Deshpande placed reliance on the order of ld. CIT(A).

9. We have heard rival submissions and perused the material on record. The only issue in the present appeal relates to the levy of penalty u/s 271(1)(c) of the Act. Admittedly, there is no variation between the returned income and assessed income. Though the return of income was filed belatedly, nevertheless it is return of income under the provisions of section 139 of the Act and the findings of ld. CIT(A) that the penalty is not leviable u/s 271(1)(c) of the Act is based on correct appreciation of facts and law governing the levy of penalty in the facts of present case. It is settled position of law that the penalty u/s 271(1)(c) of the Act is leviable with reference to concealment in the return of income. Reference can be made to the following decisions:

- (a) N.A. Malbary & Bros. Vs. CIT, 51 ITR 295 (SC)
 (b) CIT Vs. Onkar Saran & Sons. 195 ITR 1 (SC)

In the absence of any variation between returned income and assessed income, no penalty u/s 271(1)(c) of the Act can be levied. Hence, we do not find any merit in the appeal filed by the Revenue. Accordingly, the appeal filed by the Revenue stands dismissed.

10. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 26th October, 2021.

Sd/-
S.S. VISWANETHRA RAVI
JUDICIAL MEMBER

Sd/-
INTURI RAMA RAO
ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 26th October, 2021
 GCVSR

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-3, Pune;
4. The Pr.CIT-2, Pune;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "B" / DR 'B', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार / BY ORDER,

//सत्यापित प्रति// True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
 आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune