

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

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

ITA No.93/Bang/2022
AssessmentYear: 2016-17

Mr. Budnar Jayakar Shetty Badagabettu Credit Co-operative Society Mission Compound Udupi 576 101 PAN NO : AGLPS4071Q	Vs.	Deputy Commissioner of Income-tax Central Circle-2 Mangaluru
APPELLANT		RESPONDENT

Appellant by	:	Smt. Sheetal, A.R.
Respondent by	:	Smt. PriyadrshiniBasaganni, D.R.

Date of Hearing	:	02.06.2022
Date of Pronouncement	:	06.06.2022

O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER:

This appeal by assessee is directed against the order of CIT(A)-2, Panaji dated 2.12.2021 for the assessment year 2016-17, wherein he confirmed the levy of penalty u/s 271(1)(c) of the Income-tax Act,1961 ['the Act' for short].

2. Facts of the case are that assessee filed original return of income for assessment year 2016-17 on 5.8.2016 disclosing total income of Rs.8,26,030/-. The same was processed under section 143(1) of the Act. There was search in the case of assessee u/s 132

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of the Act on 1.2.2017 at the business premises of M/s. Badagubettu Credit Co-operative Society Limited, Udupi. The present assessee is the General Manager of this Society. During the course of search action, certain documents were seized from his chamber at the premises of Badagubettu Credit Co-operative Society Ltd. At the same time, residence of the assessee was searched u/s 132 of the Act on 1.2.2017 and statements were recorded from him u/s 132(4) of the Act and various incriminating materials were found. Thereafter assessment order was framed u/s 153C of the Act. The assessee agreed for addition of Rs.83 lakhs vide statement recorded u/s 132(4) of the Act and the same was disclosed in the return of income. However, claimed a deduction of Rs.23,83,069/- u/s 57 of the Act. The A.O. computed the income of the assessee as follows:-

1) Income from salary	-	9,81,498/-
2) Income from business or profession	-	83,00,000/-
Total	-	92,81,498/-
Deduction under Chapter VIA	-	<u>1,55,472/-</u>
Net taxable income	-	<u>91,26,026/-</u>

Thus, the A.O. disallowed the claim of expenditure of Rs.23,83,069/-.

2.1 Further, the A.O. initiated the penalty proceedings u/s 271(1)(c) of the Act. In mean time, the assessee filed appeal before CIT(A) challenging the disallowance of Rs.23,83,069/-. The CIT(A) deleted addition vide his order dated 2.4.2019, by observing as under:-

"I have gone through the rival contentions regarding investment in Hotel and Lodging building of M/s. Grand De Himalaya Hotels & Resorts Private Limited, the appellant has declared additional

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income under section 132(4) and the said declaration has been reduced by claiming deduction under section 57 such as loans from Badagabettu Co-op. Society Ltd. vide account No.CCL/S5 and CCL/S 6 amounting to Rs.40,00,000/- and Rs.2,00,00,000/- respectively and interest paid on said loan from Badagabettu Co-op. Society Ltd. I hold that, the unexplained investment brought to tax under section 69A in the preceding assessment year 2015-16 amounting to Rs.1,30,00,000/-, I have deleted the said additions made by my order in ITA No.100/CIT(A)-2/18-19 of even date. Accordingly, interest paid on such loans during the assessment year under question should be allowed as deduction. Hence, I direct the AO to consider the above claim of the appellant as disclosed in the revised return of income filed and accordingly delete the additions made amounting to Rs.23,83,069/-. The first ground of appeal is allowed.”

3. Now the assessee is in appeal before us with regard to levy of penalty u/s 271(1)(c) of the Act. The contention of the Ld. A.R. is that the penalty cannot be sustained in view of the deletion of addition by Ld. CIT(A) and she also relied on the order of the Tribunal in the case of RBJ Infratech Pvt. Ltd. in ITA No.9530/Del/2019 dated 30.3.2021, wherein coordinate bench of Delhi taken following view:-

“B.1 After hearing both sides, we are of the view that penalty u/s 271(1)(c) of IT Act levied by AO has no legs to stand at present, when the corresponding additions made by the AO have already been deleted by ITAT vide its aforesaid order dated 22.12.2020 when the aforesaid quantum addition does not survive, the penalty levied u/s 271(1)(c) of IT Act on the corresponding quantum addition also cannot survive. We take support from judicial precent in the case of KC Builders Vs. ACIT 135 Taxman 461 (SC), in which the Hon’ble Apex Court held that where the additions made in the assessment order, on the basis of which penalty for concealment was levied, are deleted, by ITAT or otherwise, the penalty cannot stand by itself and is liable to be cancelled. In such

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a situation, there is no basis at all at present for sustaining the penalty u/s 271(1)(c) of IT Act, and therefore, in such a case, such penalty cannot survive presently. In view of the foregoing, the penalty levied u/s 271(1)(c) of IT Act (in respect of quantum addition already deleted by ITAT in aforesaid order dated 22.12.2020 in ITA No.3152/Del/2018) is hereby cancelled. Accordingly, appeal filed by the assessee is allowed.

Order was already orally pronounced in the open court on 25.3.2021 after conclusion of the hearing in the presence of representatives of both sides. Now this order in writing is signed today on 30.3.2021.”

4. In view of the above order of the Tribunal, she prayed that penalty may be deleted.

5. Ld. D.R. not put any serious objection.

6. We have heard the rival submissions and perused the materials available on record. Admittedly, the Ld. CIT(A) already deleted the quantum addition made by the AO in this case at Rs.23,83,069/- vide order dated 2.4.2019 for assessment year 2016-17 in ITA No.101/CIT(A)-2/18-19. However, the AO levied penalty on account of difference between the income offered in original return of income and final assessed income. The final assessed income includes an amount of Rs.23,83,069/-. In our opinion, A.O. cannot levy penalty which is already deleted by the Ld. CIT(A). It is also noted that Ld. CIT(A) not considered this amount of Rs.23,83,069/- while levying penalty vide his order 24.10.2019. The Ld. CIT(A) while dealing with the appeal relating to levy of penalty u/s 271(1)(c) of the Act, he confirmed the levy of penalty to the extent of Rs.16,59,756/- as levied by AO and he relied on the judgement of Hon'ble Supreme Court in the case of MAK Data Pvt. Ltd. Vs. CIT in Civil Appeal No.9772 of 20123 (arising out of Special Leave Petition No.18389 of 2013) wherein it was held that in cases where the offer of surrender was made in

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view of detection made by AO in the course of search & seizure operation, then the statute did not recognize those types of defenses under the explanation 1 to section 271(1)(c) of the Act. It emphasized that in such cases:-

- (i) Voluntary disclosure does not release the appellant assessee from the mischief of penalty proceedings.
- (ii) The law does not provide that when an assessee makes a voluntary disclosure of his concealed income, he had to be absolved from penalty.

6.1 Further, it was observed by Ld. CIT(A) that the income declared by the assessee is based on entry in books of accounts/other documents pertaining to any previous year which commenced before the date of search and return of income has been filed before search but such income was not declared then, even if the assessee declared such income in the return of income filed after search, he will be deemed to have concealment/furnished inaccurate particular of income. It has to be noted that not only the appellant had not disclosed this income in his original return of income but even in the statement recorded u/s 132(4) of the Act, he had given evasive reply regarding the actual investment made in the hotel project. Therefore, at no stretch of imagination, the disclosure could be termed as voluntary. It is also to be noted that before us, she had only made a plea that the Ld. CIT(A) has already deleted the quantum addition and no penalty could be levied. However, she has not put any argument with regard to the above finding of the Ld. CIT(A). Since she has not made any argument on the above issue, and also lower authorities have not considered any deleted additions for levy of penalty, there is no merit in the argument of assessee's counsel that no penalty could be levied when addition is deleted where there is no levy of penalty on this deleted amount.

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In view of the above, we are of the opinion that sustaining penalty by Ld. CIT(A) is justified and reject all the grounds raised by the assessee in this appeal.

6.2 Further, the assessee argued that A.O. issued the show cause notice for levy of penalty on 24.10.2019, which was posted for hearing on 8.11.2019 and levied penalty u/s 271(1)(c) of the Act on 24.10.2019, which is opposed to law and against the natural justice. However, no evidence has been placed before us or any argument was made before us. Accordingly, this ground is rejected.

6.3. The assessee also raised a ground that AO ignored the fact that once the revised return filed u/s 153C of the Act, the original return u/s 139 of the Act abates and becomes non-est. However, we find that in view of judgement of Hon'ble Supreme Court in the case of MAK Data Pvt. Ltd. (supra) these ground of appeal have no merit.

7. In the result, the appeal of the assessee is dismissed.

Order pronounced in the open court on 6th Jun, 2022

Sd/-
(Beena Pillai)
Judicial Member

Sd/-
(Chandra Poojari)
Accountant Member

Bangalore,
Dated 6th Jun, 2022.
VG/SPS

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Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

**Asst. Registrar,
ITAT, Bangalore.**