

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCHES "A" : DELHI

BEFORE SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER  
AND  
SHRI N.K. CHOUDHARY, JUDICIAL MEMBER

ITA.No.4795/Del./2017  
Assessment Year 2011-2012

M/s. Asia Sugar Industries Pvt. Ltd., 6-B, Jor Bagh Lane, New Delhi. PAN AAACS2286D	vs.	The ACIT, Central Circle-5, New Delhi.
(Appellant)		(Respondent)

For Assessee :	Shri Tanpreet Singh Kohil, Advocate
For Revenue :	Sh. Zahid Parvez, Sr. DR

Date of Hearing :	02.06.2022
Date of Pronouncement :	13.06.2022

**ORDER**

**PER ANIL CHATURVEDI, A.M.**

This appeal by Assessee has been directed against the Order of the Ld. CIT(A)-24, New Delhi in Appeal No.82/16-17, Dated 30.05.2017 relating to the A.Y. 2011-2012.

2. The relevant facts as culled out from the material on record are as under :

2.1. The assessee is a group company of Samir Thukral Group. A search and seizure operation under section 132 of the I.T. Act, 1961 was carried out in the business premises of the assessee [Samir Thukral] group of companies and residential premises of the Directors of the company on 28.03.2011. Consequent to the search, the Assessing Officer [in short "A.O."] issued notice under section 142(1) of the I.T. Act, 1961 on 10.05.2012 and in response to which, the assessee submitted that the return of income filed by the assessee on 30.09.2011 declaring income of Rs.26,56,590/- be considered as the return filed in response to notice under section 142(1) of the I.T. Act, 1961. Thereafter, the case was taken-up for scrutiny and assessment was framed under section 143(3) vide order dated 28.03.2013 and the total income of the assessee was determined at Rs.84,05,446/- *inter alia*, by making the addition of Rs.44,50,000/- on account of unaccounted cash and addition of Rs.26,080/- on account of deferred revenue

expenditure apart from other disallowances/additions. On the aforesaid disallowances/additions made, A.O. vide penalty order dated 30.03.2016 imposed penalty of Rs.14,86,842/- under section 271(1)(c) of the I.T. Act, 1961.

2.2. Aggrieved by the order of the A.O. assessee carried the matter in appeal before the Ld. CIT(A) who vide order dated 30.05.2017 in Appeal No.82/16-17 granted partial relief to the assessee.

3. Aggrieved by the order of the Ld. CIT(A), the assessee is now in appeal before the Tribunal and has raised the following grounds :

1. *“The Learned CIT(A) erred in fact and in law in confirming the penalty on an addition of Rs.26,080 which is not only bad in law but also against the facts and circumstances of the case.*
2. *The learned CIT(A) erred in fact and in law in directing the AO to issue notice u/s.271AAA which is not only illegal but void abinito as the proceedings u/s.271AAA is/ barred by limitation.”*

4. With respect to ground No.1, the Learned A.R. submitted that A.O. by disallowing made addition Rs.26,080/- that was debited as “deferred revenue expenditure” to its P & L A/c. The A.O. held that since the expenditure did not pertain to the assessment year under consideration, it was not allowable and accordingly he disallowed the same. On the aforesaid amount disallowed, A.O. has levied penalty under section 271(1)(c) of the I.T. Act, 1961.

4.1. The Learned A.R. submitted that in the assessment order in respect of the addition made and on which penalty has been levied, no satisfaction has been recorded by the A.O. as to whether it is a case of concealment of income or a case of furnishing of inaccurate particulars of income. He submitted that in the absence of proper recording of satisfaction, no penalty under section 271(1)(c) of the I.T. Act is leviable. In support of his contentions, he relied on the decision of Hon’ble Karnataka High Court in the case of CIT vs., Manjunatha Cotton & Ginning Factory [2013] 35 taxmann.com 250 [Karnataka]

and CIT vs., SSA's Emerald Meadows [2016] 76 taxmann.com 241 [Karnataka]. He submitted that the decision of Hon'ble Karnataka High Court on appeal by the Department in the case CIT vs., SSA's Emerald Meadows has been confirmed by the Hon'ble Supreme Court and is reported in 73 taxmann.com 248 (SC). He further submitted that the addition has been made on account of difference of opinion and the addition on account of difference of opinion cannot be the basis for levy of penalty under section 271(1)(c) of the I.T. Act, 1961. He, therefore, submitted that the penalty levied by the A.O. on the aforesaid disallowance of expenses, be deleted.

5. With respect to ground No.2, the Learned A.R. submitted that during the course of search cash of Rs.58 lakhs was found and out of which Rs.44,50,000/- was seized. During the course of assessment proceedings, assessee was asked to give explanation about the cash found to which assessee *inter alia*, submitted that cash of Rs.13,50,000/- was recorded cash. With respect to balance cash of Rs.44,50,000/-, it was submitted that it pertains to

cash sale of sugar of assessee company and the said cash sale was recorded in the books of account and the sales were also reflected in the copy of the sales tax return.

5.1. After considering the submissions of the assessee, the A.O. made addition of Rs.44,50,000/- under section 69A of the I.T. Act, 1961 as according to the A.O. assessee had not given any satisfactory answer. On the aforesaid addition A.O. had levied the penalty under section 271(1)(c) of the I.T. Act, 1961.

5.2. The Learned A.R. submitted that when the matter levy of penalty under section 271(1)(c) of the I.T. Act was carried before the Ld. CIT(A), the Ld. CIT(A) at page-7 of the order deleted the penalty by holding that A.O. had erroneously applied the provisions of section 271(1)(c) of the I.T. Act, 1961, but, however the Ld. CIT(A) vide para-4.2 of the order directed the A.O. to issue notice under section 271AAA of the I.T. Act, 1961 for levy of the penalty.

5.3. The Learned A.R. submitted that as per the provisions of Section 271AAA of the I.T. Act, 1961, the

discretion for levy of penalty rests only with the Assessing Officer (“A.O.”) and as per the definition under section 2(7A), A.O. means – *Assistant Commissioner or Deputy Commissioner or Assistant Director or Deputy Director or the Income Tax Officer* and that Ld. CIT(A) does not fall within the definition of “Assessing Officer” and thus, according to him, the Ld. CIT(A) cannot issue any direction for levy of penalty under section 271AAA of the I.T. Act, 1961. He, therefore, submitted that the direction of the Ld. CIT(A) for levy of the penalty becomes *void abinitio*.

5.4. Learned A.R. thereafter, referred to the powers of the Commissioner (Appeals) as contemplated under section 251 of the I.T. Act, 1961. He, referring to the provisions of Section 251(1)(b) the CIT(A) in an appeal against the order imposing a penalty can either confirm the penalty or he may cancel the penalty or he may vary it either to enhance the penalty or reduce the penalty. He submitted that the impugned order before Ld. CIT(A) was against the order imposing penalty under section 271(1)(c) of the I.T. Act. He submitted that as per the provisions of Section 251(1)(b) it

is not open to the Ld. CIT(A) to set aside the order of the A.O. and order a remand or to give any direction. He pointing to page-33 of CIT(A) order submitted that in the present case the Ld. CIT(A) has directed the A.O. to issue notice under section 271AAA of the I.T. Act, 1961 in respect of addition of Rs.44,50,000/- on account of undisclosed cash and to consider (in the course of penalty proceedings) if the condition of levy of penalty under section 271AAA are applicable and that A.O. was directed to arrive at his own independent finding regarding the levy or dropping of penalty under section 271AAA of the I.T. Act, 1961. He, therefore, submitted that the Ld. CIT(A) does not have jurisdiction to set aside the penalty proceedings and issue directions for initiation of another penalty proceedings under altogether different provisions of the Act. In support of his contentions, he placed reliance on the decision of Hon'ble Kerala High Court in the case of CIT vs., Eminent Enterprises [1992] 65 Taxman 220 [Kerala]. The Learned A.R. relying on the aforesaid decision submitted that the direction issued by the Ld. CIT(A) is in contravention of

provisions of Section 251 of the I.T. Act, 1961 and thus, invalid and *void abinitio*. He thereafter submitted that the action of the Ld. CIT(A) ordering for initiation of penalty under section 271AAA is also barred by limitation as prescribed under section 275 of the I.T. Act, 1961 and, therefore, *void abinitio*. He submitted that as per the provisions of Section 275(1)(b) of the I.T. Act, 1961, the order of penalty could have been passed latest by the expiry of the financial year in which the proceedings in the course of which action for imposition of penalty has been initiated or completed i.e., latest by 31.03.2013 or within one year from the end of the financial year in which the order of the Commissioner (Appeals) was received by Principal Chief Commissioner i.e., by 31.03.2016. He submitted that the order passed by the Ld. CIT(A) on 30.05.2017 being beyond the prescribed date, it is, therefore, barred by limitation and thus, *void abinitio*. He, therefore, submitted that direction for levy of penalty by the Ld. CIT(A) under section 271AAA is bad in law and, therefore, be set aside.

6. The Ld. D.R. on the other hand supported the orders of the lower authorities and with respect to direction given by the Ld. CIT(A) for levy of penalty under section 271AAA, he submitted that it was within the powers of Ld. CIT(A) to give necessary directions and to support his contentions he placed reliance on the decision rendered by Hon'ble Delhi High Court in the case of Gurinder Mohan Singh Nindrajog vs., CIT in ITA.No.322 of 2005 order dated 30.09.2011. He placed on record the copy of the aforesaid decision.

7. We have heard the rival arguments of both the parties and perused the material on record. The issue in the first ground is with respect to levy of penalty under section 271(1)(c) of the I.T. Act, 1961. A perusal of the assessment order reveals that while making the addition of Rs.26,080/- on account of deferred revenue expenditure, no satisfaction has been recorded by the A.O. as to whether it is a case of concealment of particulars of income or furnishing of inaccurate particulars of income. We find force in the arguments of the Learned A.R. and the decisions relied on

by the Learned A.R. On this score itself similar view is taken by Hon'ble Karnataka High Court in the case of CIT vs. M/s. SSAs Emerald Meadows 73 taxmann.com 241. This decision is confirmed by the Hon'ble Supreme Court reported in 73 taxmann.com 248 (SC). In this view of the matter, the orders of the authorities below are set aside and penalty is cancelled. **Ground of appeal No.1 of the assessee is allowed.**

8. As far as the issue raised in ground No.2 i.e., with respect to direction of Ld. CIT(A) to A.O. for levy of penalty under section 271AAA is concerned, we find that Ld. CIT(A) vide para 4.1.3 of the order had deleted the penalty levied under section 271(1)(c) of the I.T. Act by holding that A.O. had erroneously applied the provisions of Section 271(1)(c) of the I.T. Act. He however directed the A.O. to initiate penalty proceedings under section 271AAA of the I.T. Act. It would be relevant to note the relevant direction given by the Ld. CIT(A) which reads as under :

*“-----Consequently, the A.O. is directed to issue of notice u/s. 271AAA in respect of the addition of Rs.44,50,000/- on account of the undisclosed cash, and to consider (in the course of the penalty proceedings) if the conditions for levy of penalty u/s 271AAA are applicable. Needless to say, the A.O. has to arrive at his own independent findings regarding actual levy (or dropping) of penalty u/s 271AAA.”*

8.1. We find an identical issue arose before the Hon'ble Kerala High Court in the case of CIT vs., Eminent Enterprises (supra). The Hon'ble Kerala High Court has held that it is not open to the First Appellate Authority i.e., Ld. CIT(A) to set aside the order of the A.O. and order a remand or to give any directions. The relevant findings of Hon'ble Kerala High Court reads as under :

*“5. Section 251(1)(a) deals with the power of the first appellate authority in disposing of an appeal against an order of assessment. The appellate authority may confirm, reduce, enhance or annul an assessment. He*

*may also set aside the assessment and refer the case altogether to the Assessing Officer for making a fresh assessment and he can also issue directions in that behalf. Section 251(1)(b) deals with an appeal against an order imposing penalty. Therein the only powers given to the appellate authority are that he may either confirm the order or he may cancel such order or he may vary it either by enhancing the penalty or reducing it. Under section 251(1)(c) cases not governed by clauses (a) and (b) can be dealt with wherein the appellate authority can pass such orders in the appeal as he thinks fit. Normally very wide discretion or jurisdiction is conferred on the first appellate authority under section 251(1)(c), in cases not coming under section 251(1)(a) or (b). He may set aside the order appealed against and order a remit or make further directions or pass such other order which will meet the ends of justice. Section 251 deals with the powers of the first appellate authority in different situations. Whereas in cases coming under section 251(1)(a) appeal against an order*

*of assessment and cases other than appeals against assessment and penalty - the first appellate authority can pass any order, appeals against assessment and penalty - the first appellate authority can pass any order as he thinks fit, in the appeals against orders imposing penalties, the power of the first appellate authority is circumscribed or confined within limits. He can only confirm or cancel such order or vary it either enhancing it or reducing it. It is not open to the first appellate authority to set aside the order of the ITO and order a remit or to give any direction as done in the instant case. This section is similar to section 31(3)(f) of the Indian Income-tax Act, 1922. Construing section 31(3)(f), a Bench of the Allahabad High Court in CIT v. Rameshwardas Ram Narain [1977] 107 ITR 710 held that there is no power in the first appellate authority to give a direction to take fresh action in accordance with law. In other words the first appellate authority in the cases governed by section 31(3)(i) corresponding to section 251(1)(b) of the Income-tax Act cannot set aside*

*the order appealed against and order a remit or give further directions in that behalf. In this perspective the Tribunal was justified in cancelling the order passed by the AAC and in the result cancelling the penalty levied. The decision of the Tribunal is not open to objection. We, therefore, hold that the order of the Tribunal does not suffer from any error of law. We answer question No 1 in the affirmative to the extent we hold that on the language of section 251(1)(b) the first appellate authority has no power to set aside the order appealed against and order a remit with directions. The order passes by the Tribunal interfering with the order passed by the AAC dated 30-12-1983 is valid and justified. We answer question No. 2 in the affirmative, against the revenue and in favour of the assessee and hold that the order of the AAC was in firm, and that he has no power to set aside an order levying penalty with a direction to pass fresh orders.*

*Both the questions are answered against the revenue and in favour of the assessee The income-tax reference is disposed of as above.”*

8.2. Before us no contrary binding decision has been pointed out by the Revenue to support its case. The reliance placed by Revenue in the case of Gurinder Mohan Singh Nindrajog vs., CIT (supra) is with respect to provisions under section 251(1)(a) and not with respect to provisions of Section 251(1)(b). Thus, the ratio of decision relied on by the Revenue is distinguishable on facts and, therefore, not applicable to the present facts. Considering the totality of the facts and circumstances of the case and relying on the decision of Hon'ble Kerala High Court in the case of Eminent Enterprises (supra), we are of the view that the Ld. CIT(A) was not justified in giving direction to the A.O. to levy penalty under section 271AAA of the I.T. Act, 1961. We, therefore, set aside the order of the Ld. CIT(A) on this ground. **Accordingly, ground of appeal No.2 of the assessee is allowed.**

**9. In the result, appeal of the assessee is allowed.**

Order pronounced in the open court on 13.06.2022.

Sd/-  
[N.K. CHOUDHARY]  
JUDICIAL MEMBER

Sd/-  
[ANIL CHATURVEDI]  
ACCOUNTANT MEMBER

Delhi, Dated 13<sup>th</sup> June, 2022

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	Ld. CIT(A) concerned
4.	CIT concerned
5.	DR ITAT "A" Bench, Delhi
6.	Guard File

//By Order//

Assistant Registrar, ITAT, Delhi Benches,  
Delhi.