

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "H": NEW DELHI

Before Shri Ani Chaturvedi, Accountant Member
and
Shri Anubhav Sharma, Judicial Member

ITA No. 7553/Del/2019
(Assessment Year: 2012-13)

Triune Energy Pvt Ltd, B-1/H-4, Mohan Cooperative Indl. Estate, Mathura Road, New Delhi (Appellant)	Vs. DCIT, Circle-25(2), New Delhi (Respondent)
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PAN: **AAKCS1045E**

Assessee by : Ms. Monika Aggarwal, Adv
Shri Lalit Mohan, CA

Revenue by: Shri M. Baranwal, Sr. DR

Date of Hearing 30/06/2022
Date of pronouncement 06/07/2022

O R D E R

PER ANUBHAV SHARMA, J. M.:

1. The appeal has been preferred by the Assessee against the order dated 10.06.2019 of Ld CIT(A)-9, New Delhi (hereinafter referred as Ld. First Appellate Authority or in short Ld. 'FAA') in appeal No. 10052/18-19 arising out of an appeal before it against the assessment order dated 23.03.2018 passed u/s 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred as 'the Act') by AO, ACIT, Circle 25(2), New Delhi (hereinafter referred as the Ld. AO).
2. The facts in brief are that the original return declaring total loss of Rs. 17,30,32,733/- was e-filed on 19.08.2011 which was assessed u/s 143(3) of the Act at loss of Rs. 14,26,63,801/- on 10.03.2015. The Assessee contested the

said assessment order before the Id CIT(A). As the appeal of the Assessee had been partly allowed by the Id CIT(A) vide appeal No. 334/15-16 dated 18.11.2016 by allowing ground of appeal on the addition on account of depreciation on intangibles of Rs. 2,40,79,042/-. Hence, the remaining additions after the decision of the Id CIT(A) were considered for the penalty u/s 271(1)(c) which are as under:-

- (i) Provision for LD charges of Rs. 27,99,953/-
- (ii) Interest on TDS of Rs. 67,797/-.

3. The Id AO while passing the impugned penalty order dated 23.03.2018 observed that the Assessee has **concealed income by furnishing inaccurate particulars of its income** and made following disallowances in the penalty order:-

"The working of penalty leviable in accordance with provisions of section 271(l)(c) of the I.T. Act is given here-in-below:-(Amount in Rs.)

<i>Concealed income where penalty u/s 271(1)(c) is initiated</i>	<i>62,89,890/-</i>
<i>Tax sought to be evaded</i>	<i>20,40,755/-</i>
<i>Minimum penalty imposable @ 100%</i>	<i>20,40,755/-</i>
<i>Maximum penalty imposable @300%</i>	<i>61,22,265/-</i>
<i>Penalty imposed</i>	<i>20,40,755/-</i>

4. The Id CIT(A) had partly allowed the appeal of the Assessee while upholding the penalty on account of additions for provision for liquidated damages charges of Rs. 27,99,953/- and interest on TDS of Rs. 67,795/-. However, found error of adding Rs. 62,89,890/- in the penalty order in regard to deemed dividend income. As in regard to that no penalty notice was issued.

5. Now the Assessee has come before the Tribunal raising following ground of appeal:-

1. *That the CIT(A) erred on facts and in law in upholding the levy of penalty by the assessing officer not appreciating that there was no concealment or furnishing of inaccurate particulars by the appellant.*
2. *That the CIT(A) erred on facts and in law in upholding the levy of penalty on the amount of addition of Rs 27,99,953 being amount written off as liquidated damages by the appellant in the relevant assessment year*
3. *That the CIT(A) erred in not appreciating that the amount of addition made by the assessing officer of Rs 27,99,953 was disclosed on the face of the profit and loss account as provision for liquidated damages written off and thus, no case for levy of penalty was made out."*

6. Heard and perused the records.

7. It was submitted on behalf of the Assessee that the additions made on account of provision for liquidated damages stands deleted by the Tribunal in ITA No. 95/Del/2017 vide order dated 17.12.2019 and with regard to other additions, it was submitted that the notice issued was ambiguous as to for what limb i.e the alleged concealment of particulars of income or furnishing inaccurate of income, the notice was issued.

8. The Id Sr. DR however, defended the orders of the Ld. Tax authorities below.

9. Giving a thoughtful consideration to the matter on record it comes up that quantum appeal in regard to the addition made by the Id AO on account of provision of liquidated damages stands deleted and once the quantum appeal is allowed no foundation is left for the levy of penalty on that account. Reliance in this regard can be placed on the judgement of Hon'ble Delhi High Court in the case of **Principal CIT vs. Fortune Technocomps P.Ltd. vide ITA 313/2016** dated 13th May, 2016 where it has held that once the assessment order of the AO in the quantum proceedings was altered by the Ld.CIT(A), in a significant way, the very basis of initiation of penalty proceedings was nonexistent. The Hon'ble Allahabad High Court in the cases of **Shadiram Balmukand [1972] 84 ITR 183** and **Dwarka Prasad Subhas Chandra [1974] 94 ITR 154** and the

Hon'ble Gujarat High Court in the case of **Lakkdhir Lalji [1972] 85. ITR 77** have also held that when the original basis of initiation of the penalty proceeding is altered or modified by the appellate authority, the authority initiating the penalty proceedings has no jurisdiction thereafter to proceed on the basis of the findings of the appellate authority. The Hon'ble Supreme Court in the case of **K.C. Builders vs. ACIT 135 Taxman 461 (SC)**, has made it crystal clear 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.

10. Now in regard to second charge for which penalty is levied for interest on TDS it can be observed that the Id AO in his assessment order had not mentioned a word regarding his satisfaction for proceeding with penalty proceedings u/s 271(1)(c) of the Act while passing the impugned penalty order dated 23.03.2018. The assessment order does not mention if penalty proceedings has to be for concealment of particulars of income or for furnishing inaccurate particulars of income. As a matter of fact the notice issued u/s 274 read with section 271 of the Act itself was ambiguous as it did not make it clear as to under which limb section of 271(1)(c) of the Act the notice was issued. On the other hand in the penalty order the Id AO has coined her own term "*concealed income by furnishing inaccurate particulars.*"

11. Hon'ble Delhi High Court in case of **PCIT v. Sahara India Life Insurance Co. Ltd. (2021) 432 ITR 84 (Delhi) (HC)**.while deciding the identical issue held as under :-

"21. The Respondent had challenged the upholding of the penalty imposed under Section 271 (1) (c) of the Act, which was accepted by the ITAT. It followed the decision of the Karnataka High Court in CIT v. Manjunatha Cotton & Ginning Factory 359 ITR 565 (Kar) and observed that the notice issued by the AO would be bad in law if it did not specify which limb of

Section 271(1) (c) the penalty proceedings had been initiated under i.e. whether for concealment of particulars of income or for furnishing of inaccurate particulars of income. The Karnataka High Court had followed the above judgment in the subsequent order in Commissioner of Income Tax v. SSA's Emerald Meadows (2016) 73 Taxman.com 241 (Kar) , the appeal against which was dismissed by the Supreme Court of India in SLP No. 11485 of 2016 by order dated 5th August, 2016."

Thus ambiguity in issue of notice and findings make the impugned order of levying penalty void ab initio and Id CIT(A) failed to consider the same.

12. Consequently, the grounds raised are sustained and the appeal is allowed. The impugned penalty order dated 23.08.2018 and confirmation order of the Id CIT(A) dated 10.06.2019 are set aside.

13. Order pronounced in the open court on 06/07/2022.

-Sd/-
(Anil Chaturvedi)
Accountant Member

-Sd/-
(Anubhav Sharma)
Judicial Member

Dated: 06/07/2022
A K Keot

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1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi