

**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH : BANGALORE**

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

ITA No. 372/Bang/2022
Assessment Year : 2012-13

Shri B.V. Sreenivasa Reddy, Srinagar Colony, Near Arunodhaya Hospital, Siriguppa Road, Bellary. PAN: AFBPR9736C	Vs.	The Deputy Commissioner of Income Tax, Central Circle – 1[3], Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Ms. Sunaina Bhatia, Advocate
Revenue by	:	Shri Venudhar Godesi, JCIT DR

Date of Hearing	:	19-07-2022
Date of Pronouncement	:	16-08-2022

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal is filed by assessee against order dated 19/01/2022 passed by the Ld.CIT(A)-11, Bangalore for A.Y. 2012-13 on following grounds of appeal:

“1. The orders of the authorities below in so far as levying penalty u/s 271[1][c] of the Act against the appellant are opposed to law, equity, weight of evidence, probabilities, facts and circumstances of the case.

2. The order of penalty passed u/s 271[1][c] of the Act is bad in law as the notice issued under section 274 rws 271 of the Act is not discernable whether the penalty proceedings are initiated for furnishing of inaccurate particulars of income or concealment of income under the facts and in the circumstances of the appellant's case.

3. *Without prejudice to the above, the authorities below are not justified in levying a penalty of Rs. 40,22,871/- u/s 271 [1] [c] of the Act under the facts and in the circumstances of the appellant's case.*

4. *The authorities below failed to appreciate that the appellant has neither concealed any income nor furnished inaccurate particulars of income to warrant levy of penalty in respect of the seizure of cash was made by CBI from the possession of the appellant and therefore, the penalty levied u/s.271[1][c] of the Act requires to be cancelled.*

5. *Without prejudice to the above, the penalty levied is highly excessive and liable to be reduced substantially.*

6. *For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and Justice rendered and the appellant may be awarded costs in prosecuting the appeal and also order for the refund of the institution fees as part of the costs.”*

2. Brief facts of the case are as under:

2.1 Assessee is an individual and Director of M/s. Obulapuram Mining Company Pvt. Ltd., Bellary. On 05/09/2011, search was conducted at the premises of assessee and cash of Rs.1,30,19,000/- was found. The assessee had not filed any return of income for A.Y. 2012-13 and the assessment was reopened u/s. 148 of the Act. In the assessment proceedings, cash found of Rs.1.30 Crores was considered to be undisclosed income in the hands of the assessee.

2.2 Subsequently, a penalty notice u/s. 271(1)(c) was issued to assessee and the penalty of Rs.40,22,871/- was levied vide order dated 31/03/2018. Aggrieved by the penalty order passed, assessee filed appeal before the Ld.CIT(A). The Ld.CIT(A) confirmed the penalty levied by observing as under:

“4.5 As regards merits of the case, seizure of cash was made by CBI from the possession of the appellant. During assessment proceedings the appellant had tried to explain

the same by showing availability of cash as per books of account. However, the appellant could not substantiate this claim and this aspect has duly been discussed by the AO in the assessment order as well as in the penalty order. During appellate proceedings the appellant has just tried to rely upon the same plea as was made during the assessment proceedings. However, neither during the penalty proceedings nor during the appellate proceedings the appellant has furnished any reasonable explanation regarding the addition made by the AO in the assessment order and why the same was not declared by him in his return of income. The AO has clearly brought out in the assessment order that the accounts being relied upon by the appellant had been cooked up and not actuals. The issue has again been discussed in detail by the AO while passing the penalty order. The reasoning given by the AO remains uncontroverted. So the provisions of Section 271(1)(c) of the Act are squarely attracted in the case of the appellant.”

Aggrieved by the order of Ld.CIT(A), assessee is in appeal before this Tribunal.

3. The main contention of the Ld.AR was that the initiation of penalty has not been clearly mentioned in the notice issued u/s. 274 of the Act and therefore the penalty levied for concealment of income / furnishing of inaccurate particulars of income in respect of unexplained cash amounting to Rs.1,30,19,000/- is bad in law. She placed reliance on the following decisions in support of her submissions.

- a) *Decision of Coordinate Bench of this Tribunal in case of Sri A.Nagaraju vs. ITO in ITA No. 2196/Bang/2016 by order dated 06/04/2018*
- b) *Decision of Hon'ble Cochin Bench in case of Shri M.R. Somarajan vs. ITO in ITA No. 50/Coch/2019 by order dated 01/08/2019*
- c) *Decision of Coordinate Bench of this Tribunal in case of Sri. Kasimali M. Sayyad vs. ITO in ITA No. 1950/Bang/2017 by order dated 18/02/2020*

4. The Ld.AR submitted that assessee had not maintained any books of accounts but the said amount that was seized was neither unexplained nor unaccounted for. She submitted that assessee was never asked to explain the source of the cash available either

during the course of the search or any notice in respect of the same was issued during the reassessment proceedings u/s. 148 of the Act.

5. The Ld.AR submitted that, the assessee during the course of reassessment proceedings produced unsigned cash book, which had sufficient balance. She submitted that, the opening cash balance as on 01/04/2011 was Rs.1,79,32,027/- and there was not much debit entry till 05/09/2011 being the date of search. The Ld.AR submitted that assessee had filed the cash book and the Axis Bank account statement before the Ld.AO during the reassessment proceedings that shows the cash available with the assessee. The Ld.AR referring to the assessment order passed by the Ld.AO dated 30/03/2015, submitted that no enquiries were conducted in respect of the submissions filed by the assessee and merely on surmises and conjectures the addition was made u/s. 69A of the Act.

Referring to the penalty order passed by the Ld.AO, the Ld.AR submitted that in para 9.2, the Ld.AO records the opening cash balance as on 01/04/2011 to be Rs.1,79,32,027/- being the closing balance as on 31/03/2011. The Ld.AR submits that paras 9.2 and 9.3 of the penalty order passed by the Ld.AO is in respect of Financial Year 2010-11 which is relevant to A.Y. 2011-12, whereas the year under consideration is A.Y. 2012-13. The Ld.AR submits that the penalty was levied merely on the premises that, the assessee has not substantiated the closing balance of Rs.1,79,32,027/-, as on 31/03/2011. She submitted that, no such query was raised by the Ld.AO in order to file either any supporting documents or submissions by the assessee.

She thus submitted that even on merits, the Ld.AO has not made out the case of concealment of income for the year under consideration being A.Y. 2012-13.

6. The Ld.AR further submitted that notice issued u/s. 274 is issued for both also for filing of inaccurate particulars and / or concealment of income. The Ld.AR to this submitted that originally, the assessee did not file any return of income and only in view of the notice issued u/s. 148, assessee filed return of income declaring income of Rs.33,835/- that included the amount of Rs.1,30,19,000/- being the cash seized during the course of search. The Ld.AR referred to the reply filed by the assessee on 09/02/2015, before the Ld.AO which is reproduced at page 4 of the assessment order. She submitted that, none of the above details have been considered by the Ld.AO while levying penalty in the hands of the assessee for year under consideration.

7. On the contrary, the Ld.DR relied on orders passed by authorities below.

8. We have perused the decisions relied by the Ld.AR in support of her claim regarding non-strike off of the specific limb in the notice issued u/s. 274 of the Act dated 30/03/2015 being

a) *Decision of Hon'ble Supreme Court in case of CIT vs. SSA's Emerald Meadows reported in (2016) 73 taxmann.com 248 (SC)*

b) *Decision of Hon'ble Karnataka High Court in case of CIT vs. Manjunatha Cotton and Ginning Factory reported in (2013) 359 ITR 565*

and the decisions of the *Coordinate Bench of this Tribunal* referred to hereinabove (*supra*).

9. Primarily, as the assessee has not filed original return of income, non-strike off of irrelevant limb any way does not make any difference. 10. Even the decision of *Hon'ble Karnataka High Court* in case of *CIT vs. Manjunatha Cotton and Ginning Factory (supra)*,

that stands upheld by *Hon'ble Supreme Court* in case of *Emerald (supra)* deals with certain circumstances under which a penalty should be imposed / cannot be imposed.

"63. In the light of what is stated above, what emerges is as under:

a) Penalty under Section 271(1)(c) is a civil liability.

b) Mens rea is not an essential element for imposing penalty for breach of civil obligations or liabilities.

c) Willful concealment is not an essential ingredient for attracting civil liability.

d) Existence of conditions stipulated in Section 271(1)(c) is a sine qua non for initiation of penalty proceedings under Section 271.

e) The existence of such conditions should be discernible from the Assessment Order or order of the Appellate Authority or Revisional Authority.

f) Even if there is no specific finding regarding the existence of the conditions mentioned in Section 271(1)(c), at least the facts set out in Explanation 1(A) & (B) it should be discernible from the said order which would by a legal fiction constitute concealment because of deeming provision.

g) Even if these conditions do not exist in the assessment order passed, at least, a direction to initiate proceedings under Section 271(1)(c) is a sine qua non for the Assessment Officer to initiate the proceedings because of the deeming provision contained in Section 1(B).

h) The said deeming provisions are not applicable to the orders passed by the Commissioner of Appeals and the Commissioner.

i) The imposition of penalty is not automatic.

j) Imposition of penalty even if the tax liability is admitted is not automatic.

k) Even if the assessee has not challenged the order of assessment levying tax and interest and has paid tax and interest that by itself would not be sufficient for the authorities either to initiate penalty proceedings or impose penalty, unless it is discernible from the assessment order that, it is on account of such unearthing or enquiry concluded by authorities it has resulted in payment of such tax or such tax liability came to be admitted and if not it would have escaped from tax net and as opined by the assessing officer in the assessment order.

l) Only when no explanation is offered or the explanation offered is found to be false or when the assessee fails to prove that the explanation offered is not bonafide, an order imposing penalty could be passed.

m) *If the explanation offered, even though not substantiated by the assessee, but is found to be bonafide and all facts relating to the same and material to the computation of his total income have been disclosed by him, no penalty could be imposed.*

n) *The direction referred to in Explanation IB to Section 271 of the Act should be clear and without any ambiguity.*

o) *If the Assessing Officer has not recorded any satisfaction or has not issued any direction to initiate penalty proceedings, in appeal, if the appellate authority records satisfaction, then the penalty proceedings have to be initiated by the appellate authority and not the Assessing Authority.*

p) *Notice under Section 274 of the Act should specifically state the grounds mentioned in Section 271(1)(c), i.e., whether it is for concealment of income or for furnishing of incorrect particulars of income*

q) *Sending printed form where all the ground mentioned in Section 271 are mentioned would not satisfy requirement of law.*

r) *The assessee should know the grounds which he has to meet specifically. Otherwise, principles of natural justice is offended. On the basis of such proceedings, no penalty could be imposed to the assessee.*

s) *Taking up of penalty proceedings on one limb and finding the assessee guilty of another limb is bad in law.*

t) *The penalty proceedings are distinct from the assessment proceedings. The proceedings for imposition of penalty though emanate from proceedings of assessment, it is independent and separate aspect of the proceedings.*

u) *The findings recorded in the assessment proceedings in so far as "concealment of income" and "furnishing of incorrect particulars" would not operate as res judicata in the penalty proceedings. It is open to the assessee to contest the said proceedings on merits. However, the validity of the assessment or reassessment in pursuance of which penalty is levied, cannot be the subject matter of penalty proceedings.*

The assessment or reassessment cannot be declared as invalid in the penalty proceedings."

11. In the present facts of the case, we note that assessee has given explanation on the income having cash available with assessee from the preceding assessment year which has not been verified by the Ld.AO during the assessment proceedings. Assessee had not lost the opportunity of filing the original return u/s. 139(1) of the Act for

A.Y. under consideration as on the date of search, and the return filed in view of the notice issued u/s. 148 of the Act, the assessee included the allegedly undisclosed cash found from the premises. For the above reasons, in our considered opinion, this is not a fit case to levy penalty u/s. 271(1)(c) of the Act. In our view, levy of penalty is not a mechanical procedure and has to be issued with lot of checks and balances. The case made out by the Ld.AO in the penalty order dated 31/03/2018 by not accepting the closing balance for financial year 2010-11 cannot be a reason to levy penalty for F.Y. 2011-12 (being A.Y. 2012-13 under consideration). We therefore direct the Ld.AO to delete the penalty so levied as it does not stand the test of law.

Accordingly, the appeal filed by assessee stands allowed.

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

Order pronounced in the open court on 16th August, 2022.

Sd/-
(CHANDRA POOJARI)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 16th August, 2022.
/MS /

Copy to:

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|---------------|------------------------|
| 1. Appellant | 4. CIT(A) |
| 2. Respondent | 5. DR, ITAT, Bangalore |
| 3. CIT | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore