



आयकर अपीलिय न्यायाधिकरण, पुणे न्यायपीठ, "बी" बेंच पुणे में।
IN THE INCOME TAX APPELLATE TRIBUNAL, PUNE "B" BENCH, PUNE
BEFORE SHRI S.S. GODARA, JUDICIAL MEMBER

AND

SHRI G. D. PADMAHALI, ACCOUNTANT MEMBER

आयकर अपीलसं. / ITA No. 490/PUN/2019

करनिर्धारणवर्ष / Assessment Year :2015-16

Shri Praphull Kaluram Shivale,
234, Balu Shetpabal Road,
Vadhu Budruk, Shirur, Pune - 412216
PAN :BFQPS4176B

..... अपीलार्थी / Appellant

बनाम / v/s.

Asstt. Commissioner of Income Tax,
Circle - 12, Pune

..... प्रत्यर्थी / Respondent

द्वारा / Appearances

Assessee by : Shri B. C. Malakar

Revenue by : Shri M. G. Jasnani

सुनवाई की तारीख / Date of conclusive Hearing :16/08/2022

घोषणा की तारीख / Date of Pronouncement :26/08/2022

आदेश / ORDER

PER G.D. PADMAHALI, AM;

The present appeal of the appellant assessee is challenged against the order of Commissioner of Income Tax (Appeals)-5, Pune [for short "**CIT(A)**"] dt. 14/02/2019 passed u/s 250 of the Income-tax Act, 1961 [for short "**the Act**"] which in turn dove out of order of penalty [for short "**PO**"] of Asstt. Commission of Income Tax, Circle-12 Pune [for short "**AO**"] dt.28/06/2018 u/s 271(1)(c) of the Act for the assessment year [for short "**AY**"] 2015-16.



2. The extant appeal is to address sole dispute over applicability of 271(1)(c) penal provision, where the income is assessed on the basis of material impounded in a survey action u/s 133A, in variation to original return filed.

3. Before proceeding for adjudication, it is apropos to reproduce the **grounds raised** by the appellant, such as;

“1. The learned CIT(A) erred in upholding the levy of penalty u/s 271(1)(c) of Rs.77,00,000/- in respect of addition of Rs.2,55,12,629/- made by the A.O. towards undisclosed business income on the ground that the assessee had concealed the particulars of his income without appreciating that no such penalty was leviable on facts and in law.”

2. The learned CIT(A) failed to appreciate that the addition of Rs.2,55,12,629/- made in respect of alleged undisclosed business income was based on estimation basis and in view of the settled law that penalty u/s 271(1)(c) is not leviable on additions made on estimation basis, the levy of penalty in the instant case was not justified.”



3. *The learned CIT(A) ought to have appreciated that the impugned addition of Rs.2,55,12,629/- was made on estimation basis and the said addition lacked precision as to accuracy of quantum of income actually derived by the assessee and therefore, the levy of penalty u/s 271(1)(c) in respect of the said addition was not warranted on facts and in law.”*

4. *The appellant craves, leave to add, alter, amend and delete any of the above grounds of appeal.”*

4. **Having set the grounds herein above, the facts born out of the records, tersely stated are;**

4.1 The appellant assessee is an individual engaged in the business of buying, developing and selling of agricultural land, has for AY 2015-16 filed his return of income [for short **“ROI/ITR”**] on 31/10/2015 declaring total taxable income of ₹31,48,350/-, wherein the case of the appellant was selected for limited scrutiny under CASS by service of notice dt. 29/07/2016 u/s 143(2). During the pendency of assessment proceedings, a survey action u/s 133A of the Act, dt. 28-29/09/2017 on the business premises of the appellant was carried out,



and based upon the impounded material inter-alia copies of sales & purchases of land, bank account statements, cash & cheque receipts, development charges etc., the subsisting limited scrutiny was converted into complete scrutiny upon the due approval of Principal Commissioner of Income Tax-4, Pune [for short "**PCIT**"] and the assessments u/s 143(3) was finally culminated at ₹2,91,28,580/- with an addition of ₹2,55,12,629/- on account of undisclosed business income and ₹4,67,600/- u/s 43CA of the Act, and followed by consequential penalty proceedings u/s 271(1)(c) of the Act, for concealment the particulars of income in relation to undisclosed business income brought to tax.

4.2 Witnessing that, the aforesaid quantum order was remained unchallenged before FAA and in the absence of any record suggesting further appeal thereagainst, Ld. AO concocted the acceptance of quantum by the assessee and by service of show cause notice [for short "**SCN**"] dt. 22/12/2017 u/s 274 r.w.s. 271(1)(c) of the Act, initiated the penalty proceedings for



concealment of particulars of income. Upon no-response to first SCN served, following the principle of natural justice, further opportunity was accorded by issue of subsequent notice dt. 28/05/2018, and failing to which the Ld. AO, in the light of explanation 1 to section 271(1)(c), by an order imposed a penalty of ₹76,80,877/- (rounded up to ₹77,00,000/-) equal to 100% of tax sought to be evaded on additional business income brought to tax and assessed u/s 143(3) of the Act., over & above the income returned in original return of income filed by the appellant assessee.

4.3 Deliberating upon the material placed in an appeal before the first appellate authority [for short "**FAA**"], the Ld. CIT(A) finding no infirmity with the levy, resounded the views of assessing officer in confirming the penalty in the light of plethora of judicial pronouncement. Aggrieved by the orders of tax authorities below, the appellant assessee brought up the matter before Tribunal with the grounds of appeal assailed herein before at para 3.



5. During the course of physical hearing, learned counsel for the assessee [for short "**AR**"] in support of grounds raised, took us through the relevant facts of the case and claimed that, imposition of penalty suffers from the basis of estimated business income, which lacks the accuracy, though was admitted on oath by the appellant and therefore penalty deserves to be deleted. Adverting to the statements recorded on oath u/s 131(1) and declaration furnished with respect to re-computation of income, records etc., it is contended that, the **disclosed additional business income or profit was estimated @25% on the business receipts** for the purpose of assessment, hence the penalty could not be imposed for the solitary reason that, the **revised computation of income was accepted without variation**. Learned departmental representative [for short "**DR**"] entrusting culmination of assessment in the light of impounded material, has firmly pleaded the survival of penalty and supporting the orders of the tax authority below argued that, the **quantum addition was carried out in the absence of revised return, but on the basis of material**



impounded which inter-alia consist of business & financial transactions, details of properties acquired, purchase & sale of lands, bank account statements, cheque & cash receipts, development charges received etc., **in the course of business activities of the appellant and same was duly confirmed u/s 131(1)**. To bolster the legality of imposition and survival of penalty the Ld. DR also contended that, by service of multiple SCN u/s 274 r.w.s. 271 of the Act, the appellant was put to notice in the context of explanation 1 thereto; however there was complete **absentia** and therefore, the failure on the part of the assessee to file correct return of income vis-a-vis failure to offer any explanation, be deemed to have concealed particulars of his income, consequently, case is befitting the levy without any express invocation of the explanation, and to buttress the said argument, reliance is also placed on the decision of Hon'ble Apex Court in the case of "**K. P. Madhusudhanan Vs. CIT**" reported at 251 ITR 99 (SC) and "**UOI Vs Dharmendra Textiles Processor**" reported in 306 ITR 227 (SC).



6. We have heard the rival contentions of both the parties; and subject to the provisions of rule 18 of Income Tax Appellate Tribunal Rules, 1963 [for short **“ITAT, Rules”**] perused the material placed on records and duly considered the facts of the case in the light of settled legal position and the case laws relied upon by the appellant assessee as well the respondent revenue.

7. Ground number 1 is general and ground number 2 & 3 alleged against levy of penalty for estimated business income, in omnibus, the only ground to adjudicate is the applicability of 271(1)(c) penal provision for concealing the particulars of income, and to deal therewith, it is appropriate to quote the relevant text of penal provision first;

271. Failure to furnish returns, comply with notices, concealment of income, etc.

(1) If the [Assessing] Officer or the [Commissioner (Appeals)] [or the Commissioner] in the course of any proceedings under this Act, is satisfied that any person-

(a)

(b)



(c) has concealed the particulars of his income or [* *
*] furnished inaccurate particulars of]such income, or

(d)

he may direct that such person shall pay by way of
penalty,—

(i)

(ii)

(iii) in the cases referred to in clause (c) [or clause
(d)], [in addition to tax, if any, payable] by him, a sum
which shall not be less than, but which shall not
exceed [three times], the amount of tax sought to be
evaded by reason of the concealment of particulars of
his income or the furnishing of inaccurate particulars
of such income.

(Emphasis supplied)

8. From the records it transpired that, scrutiny assessment was culminated in the light of impounded material and the statement recorded on oath to the effect that, **“no proper books of accounts were maintained and the original returns were filed on estimation basis not reflecting the true and fair view of business transaction under taken for the impugned assessment year”** and a written submission of the appellant detailing the



reworking of total business receipts including of bank/cheque & cash receipts, development charges received and profit earned therefrom for the impugned assessment year, which collectively in the opinion of the Ld. AO **de-jure** sufficient to hold the concealment of particulars of income while filing the original return by the appellant, and this **ispo-facto** in the absence of deprecative material, indeed is good and substantive to hold as such.

9. Glaringly, the appellant did not file any revised return during the course of scrutiny assessment proceedings, but mere a revised computation of income incorporating the business profit earned at certain percentage of business receipts deciphered out of bank account statements, bank receipts, cash receipts, development charges received and transaction of sales & purchases of lands, etc., which formed absolute basis for assessment and consequential imposition of penalty u/s 271(1)(c) of the Act, for concealing the particulars of income and when this fact was brought to the notice of



the assessee during the course of penalty proceedings, the assessee offered to pay tax on the sum without answering the question posed to him. Therefore, it is not a case wherein a disclosure was voluntarily made, indeed the assessee accepted the differential amount of business profit earned by him only after the same was brought to surface owing to survey action u/s 133A of the Act, otherwise actual business profits would have remained un-assessed and untaxed, if survey action could not have taken place and in any case, so-called voluntary disclosure of business profit by furnishing re-computation cannot alter the consequences in the light of decision of the Hon'ble Apex Court in the similar facts and circumstances in **"MAK Data Pvt Ltd Vs CIT"** reported in 358 ITR 598.

10. Given that, section 274 provides that, no order imposing a penalty shall be made unless the assessee has been heard or has been given a reasonable opportunity of being heard. In the present case, a penalty SCN was issued u/s 274 r.w.s. 271 of the Act, and upon failure to respond to first SCN, the appellant was put to further notice which



remained unattended, **ad-idem**, it clearly indicates that, the due & sufficient opportunity of being heard was provided to the appellant before proceeding to actual levy, **ergo**, the requirement of section 274 of the Act stands complied with and penal provisions being a civil liability calling no act of or ingredient for wilful concealment as laid by Hon'ble Supreme Court vide 25 in the case of **"UOI Vs Dharmendra Textile Processors"** reported in 306 ITR 277 (SC).

11. Re-computation of business income upon the survey action in the light of impounded material spoke loudly about the conduct of the assessee, which could not be said to be anything else than disingenuous and thus filing of said recomputation of income did not obliterate the fact of the earlier act of concealment of particulars with a view to suppress the income and therefore was liable to penal action as contemplated in section 271(1)(c) of the Act, and we note that the tax authorities below ceased such finding adverse to the appellant, and is not shown to be perverse or arbitrary in any manner warranting interference, **ergo**



we hold that, the Ld. AO was justified in levying the minimum penalty, and we see that, our view has been rightly fortified by the decision of Hon'ble jurisdictional High Court of Bombay, in the case of "**Jyoti Laxman Konkar Vs CIT**" reported in 292 ITR 163.

12. **Nota bene**, in the similar facts and circumstance, where the income of the appellant is assessed in variation to income returned, the Hon'ble Supreme Court in the case of "**MAK Data Pvt Ltd Vs CIT**" reported in 358 ITR 593 observed that, the explanation to section 271(1) raises a presumption of concealment when income is finally assessed in variation of returned income, and it was in this factual scenario where the income reported by the assessee in the return filed was lower than the income finally assessed and brought to tax, it is held that the penalty was rightly leviable.

13. Apropos, in view of the aforesaid discussion, the grounds appealed stands adjudicated against the appellant assessee and in favour of revenue and nothing



contrary has been shown to us in the present facts which would warrant our taking a view different from Hon'ble Supreme Court in "MAK Data Pvt Ltd Vs CIT" (Supra) and Hon'ble jurisdictional High Court of Bombay in case of "Jyoti Laxman Konkar Vs CIT" (Supra).

14. Resultantly, the appeal of the appellant assessee is dismissed in terms of aforestated observation.

In terms of rule 34 of ITAT Rules, the order pronounced in the open court on this Friday 26th day of August, 2022.

S. S. GODARA
JUDICIAL MEMBER

G. D. PADMAHSHALI
ACCOUNTANT MEMBER

पुणे / PUNE ; दिनांक / Dated : 16th day of August, 2022.

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The Pr. CIT-4, Pune (Mh-India)
4. The CIT(A)-5, Pune (Mh-India)
5. विभागीय प्रतिनिधि, आयकर अपीलीय न्यायाधिकरण, पुणे "बी" बेंच, पुणे / DR, ITAT, Pune "B" Bench, Pune.
6. गार्डफाइल / Guard File.

आदेशानुसार / BY ORDER,
वरिष्ठनिजीसचिव / Sr. Private Secretary
आयकर अपीलीय न्यायाधिकरण, पुणे / ITAT, Pune.