

आयकर अपीलिय अधिकरण, 'सी' न्यायपीठ, चेन्नई।
IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH: CHENNAI

श्री महावीर सिंह, उपाध्यक्ष, एवं
डॉ। दीपक पी. रिपोटे, लेखा सदस्य के समक्ष
BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
DR. DIPAK P. RIPOTE, ACCOUNTANT MEMBER

आयकरअपीलसं./ITA No.3170/Chny/2019
निर्धारणवर्ष/Assessment Year: 2009-10

The Dy. Commissioner of-
Income Tax,
Corporate Circle-3(2),
Chennai.

(अपीलार्थी/Appellant)

v. M/s.Vicoans Infrastructure
Environmental Engineering
Pvt. Ltd.,
No.39, 1st Cross Street, West
CIT Nagar, Nandanam,
Chennai-600 035.
[PAN:AACCV 4087 H]
(प्रत्यर्थी/Respondent)

Department by : Mr.P. Sajit Kumar, JCIT
Assessee by : None
सुनवाईकीतारीख/Date of Hearing : 24.08.2022
घोषणाकीतारीख /Date of Pronouncement : 24.08.2022

आदेश / ORDER

PER DR. DIPAK P. RIPOTE, ACCOUNTANT MEMBER:

This appeal filed by the Revenue is directed against the order of the Commissioner of Income Tax (Appeals)-11, Chennai, dated 22.08.2019 pertaining to assessment year 2009-10, emanating from the order of AO passed u/s.271(1)(c) of Income Tax Act, 1961, dated 29.03.2019.

2. The Revenue has raised the following grounds of appeal:

1. The order of the learned CIT(A) is contrary to law and facts and circumstances of the case.

2. The Id.CIT(A) has erred in deleting the penalty levied u/s.271(1)(c) by stating that the penalty levied u/s.271(l)(c) of the Act without striking of the relevant

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portion in the notice issued u/s 274, by which the appellant was not put to notice whether the penalty was initiated for concealment of particulars of income or for furnishing inaccurate particulars of such income.

3. The Id.CIT(A) has erred in deleting the penalty levied u/s.271(1)(c) by overlooking the jurisdictional Madras High Court in the case of Sundaram Finance Limited 403 ITR 407 wherein the Court had held that non-striking of relevant limb in the penalty notice cannot invalidate the penalty proceedings against the assessee.

4. The Id.CIT(A) ought to have upheld the levy of penalty as both the limbs of the penalty u/s.271(1)(c) i.e., concealment of particulars of income and furnishing inaccurate particulars are applicable in the instant case.

5. The Id.CIT(A) ought to have appreciated the fact that but for the reopening of assessment, the property transaction would not have been brought to tax during the AY:2009-10 and also the Id.CIT(A) in the earlier quantum order has sustained the capital gains addition at Rs.6,39,76,479/-.

6. For these and other grounds that may be adduced at the time of hearing, it is prayed that the order of the learned CIT(A) may be set aside and that of the Assessing Officer be restored.

3. None appeared for the assessee. The Ld.DR was heard. The case records were perused.

4. The only question before us in this appeal is whether action of the Ld.CIT(A) deleting the penalty order on the issue that the notice u/s.271(1)(c) of the Act, was defective as the appropriate words i.e. concealed particulars of income or filed inaccurate particulars of income, were not struck off by the AO. The Ld.CIT(A) followed the decision of the Hon'ble Karnataka High Court in the case of M/s.Manjunatha Cotton and Ginning Factory reported in 359 ITR 565, wherein, it has been held that the notice was defective and hence, penalty not maintainable. The Ld.CIT(A) has also discussed the case on merits and deleted the penalty.

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4.1 The Ld.DR made Written Submissions, which are reproduced hereunder:

A. Facts of the case:

The assessee did not file its return of income. Based on information, the case was reopened u/s 147 of the Act and a notice u/s.148 issued on 14/03/2016. In response to the notice served, the assessee filed a return of income, that too belatedly, on 27/12/2016 admitting an income of Rs.19,76,890/-. No capital gain income was disclosed therein.

During the course of assessment, the Assessing Officer computed the long-term capital gain escaping assessment as Rs.66.56 crores and initiated penalty proceeding u/s 271(1)(c) of the Act for concealing the long term Capital gain. On an appeal, CIT(A)'s reduced the long-term capital gain escaping assessment to Rs.6.39 crores. Both the assessee and the Department accepted the CIT(A)'s order and thus the assessment becoming final. Accordingly, the penalty proceeding initiated was concluded by the Assessing officer by imposition of penalty u/s 271(1)(c) of Rs.1,92 (approx.) being 100% of tax which had escaped assessment consequent to non-declaration of income u/s 139 as well as u/s 148 of the Act by the assessee. On an appeal against levy of penalty, the CIT(A)'s struck-down the levy of penalty both on account of non-compliance to the procedural law as well as on merit. CIT(A)'s held that the notice of penalty issued u/s 274 of the Act suffered from an irregularity on account of the following:

- a. Notice issued did not contain strike off between "and/or" with respect to two limbs on which penalty could be levied*
- b. Assessment order passed had only mentioned penalty proceeding u/s.271(1)(c) is initiated separately for concealment of income or for providing inaccurate particulars of income'*

On merits, the CIT(A)'s concluded that..

- a. The assessee seems to have been in two minds with respect to the year of incidence of capital gain since the agreement which it entered into during the year was an unregistered document and hence had no evidentiary value under the Transfer of Property Act-18 82*
- b. The assessee was ill-advised and could not take a decision with respect to the year of liability of capital gains*
- c. The transaction was very complex.*
- d. It is heartening and surprising to note that both department as well as the assessee has accepted the order of the CIT(A) on quantum addition*

B. Submission of the Department:

- a. On irregularity in issuance of notice:**

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In the case of the assessee there was only a single issue, i.e. Incidence of capital gain on sale of land irrevocable agreement it entered into for transfer of 2.27 acre of land to M/s True Value Homes Pvt. Ltd. Based on this irrevocable agreement, assessee received substantial part of the agreed amount as advance and had given possession of the property during the year itself. Since it implied part performance within the meaning contained under section 2(47) of the Act, the capital gain arising out of this transfer of immovable property was assessed to tax during this year. The assessee had not declared this transaction by filing of a return u/s 139 and hence the case was reopened u/s 147. Even in the return submitted in response to notice issued u/s 148, the assessee failed to declare voluntarily the transaction and offer the capital gain received on account of this transaction to tax. Hence, the penalty proceeding was initiated for concealment of income by way of furnishing inaccurate particulars of income.

As can be seen, there was only a single issue and the facts of which the assessee was well aware of as in the body of the Assessment order itself it was communicated in line with subsection (IB) of section 271. The assessee cannot plead that it did not know for what reason the penalty proceeding was initiated and whether it was for 'concealment' or for 'furnishing inaccurate particulars of income in the return'. The assessee knew from the beginning that the assessee's case was re-opened u/s 147 only with the view to scrutinize the transaction the assessee carried out with respect to its immovable property and bring to tax the capital gain it obtained out of this transaction. In spite of having full knowledge of all the facts, the assessee opted not to declare voluntarily the transaction in its return to be furnished under the normal provisions u/s 139 or even after issuance of a notice u/s.148 at a much later date of conclusion of the transaction and enjoyment of the proceeds therefrom. Thus assessee knew very well that it had furnished both inaccurate particulars of income as well as concealed the capital gain it received from such transaction well before even assessment was concluded. Hence, the assessee is precluded from pleading that principles of natural justice were violated on account of not being able to submit an effective reply on account of confusion created by way of the defective notice which did not strike out 'and/or' portion of the communication. The CIT(A)'s failed to appreciate this specific fact of the assessee's case and had mechanically, based on a judgement pronounced by the Division Bench of the Karnataka High court in the case of Manjunatha Cotton mills (359 ITR 565), held the notice issued is bad in law and holding the Penalty proceedings initiated is null and void. CIT(A) 's failed to take in to note the Jurisdictional High Court decision in the case of M/s Sundaram Finance Limited as reported in 403 ITR 407, which clearly spelt what need to be looked into is not whether there was defect in the notice but whether such defect in the communication notice has led to creation of confusion in the mind of the recipient and thus violation of Principles of Natural justice for effective representation of its case. It may be brought to your notice that the case law cited above, the Jurisdictional High Court has taken into account the case decision of Karnataka High court in the case of Manjunatha Cotton mills and others before arriving at this conclusion.

b. On merits:

CIT(A) was naive in accepting the assessee's plea that it was confused on the actual year in which the incidence of capital gain would arise. He failed to note that the Department initiated proceedings u/s 147 in the financial year 2015-16 and the assessee filed its return in response to notice in the late part of the financial year 2016-17. If the assessee was so innocent and it did not have any

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intension to evade taxation, then it would have offered voluntarily the capital on the transaction in the later years which followed the year of the transaction i.e. financial year 2008-09. From the record of the department as well as the assessee it was evident that it did not declare the same even after seven years of such gain being obtained through the transaction, though the amount involved therein has been huge. CIT(A)'s failed to note that the assessee had not voluntarily offered any income for taxation and had not even complied by its statutory duty of filing annual income tax return u/s 139 of the Act. Even when notice was served u/s 148 calling for a return, knowingly well in advance the circumstances under which its case was re-opened, it still preferred to conceal the transaction and offer any income for taxation. The amount had to be taxed by way of an order passed by the Department to enforce the tax recovery of the escaped income and there was no question of any acceptance to pay the tax from the part of the assessee. CIT(A)'s was carried away by his personal opinions on the complexity of the transaction by focusing on the form of the transaction rather than focusing on the sum and substance of the transaction. For the reasons stated above, the penalty order passed by the assessing officer dated 29-03-2019 may be restored.

4.2 We have studied the case records. It is observed that the Hon'ble Madras High Court in the case of Babuji Jacob v. ITO reported in [2021] 124 taxmann.com 363 [Madras], has held as under:

"8. A show cause notice was issued to the assessee proposing to initiate proceedings under Section 271(1)(c) of the Act vide notice dated 30.3.2016. A copy of the said notice dated 30.3.2016 has been furnished in the typed set of papers and we find that the said notice does not specifically state as to whether the assessee is guilty of concealing particulars of his income or has furnished inaccurate particulars of income.

9. It is the submission of the learned Senior Standing Counsel appearing for the Revenue that both limbs are attracted in the notice.

10. This issue will be considered by us in the latter part of this judgment.

11. On receipt of the said notice dated 30.3.2016, the assessee submitted a reply dated 11.4.2016 pointing out that there was no bona fide, that there was no cause for imposing penalty, that he had furnished correct particulars and that the allegation made against him was erroneous.

12. The Assessing Officer, by order dated 28.9.2016, did not accept the explanation offered by the assessee and levied penalty of Rs.50 lakhs. Aggrieved by the same, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals)-2, Chennai [for short, the CIT(A)], who dismissed the appeal by order dated 30.6.2017. Challenging the same, the assessee preferred an appeal before the Tribunal, which was rejected by the impugned order. This is how the assessee is before us by way of this appeal.

13. The first aspect to be considered is as to whether the notice issued under Section 271(1)(c) of the Act dated 30.3.2016 is legally valid and proper.

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Admittedly, the notice did not specifically mention as to whether the assessee concealed particulars of his income or furnished inaccurate particulars or both.

14. Such notices, which did not specify as to which limb of Section 271(1)(c) of the Act would get attracted, were held to be bad in law in the decision of the Karnataka High Court in the case of CIT Vs. Manjunatha Cotton and Ginning Factory [reported in (2013) 359 ITR 565], which was followed in the decision of the Karnataka High Court in the case of CIT, Bangalore Vs. SSA Emerald Meadows [reported in (2016) 73 Taxmann.com 241] and in the decision of this Court, to which, one of us (TSSJ) was a party, in the case of CIT Vs. Original Kerala Jewellers [TCA.No.717 of 2018 dated 18.12.2018].

15. Thus, by applying the law laid down in the above decisions, we can safely hold that such notices are bad in law. Consequently, the penalty proceedings initiated are to be held to be wholly invalid”.

4.3 The Hon’ble Bombay High Court has held in the case of Ganga Iron & Steel Trading Co. v/s Commissioner of Income Tax. [2022] 135 taxmann.com 244 (Bombay) order dated December 22, 2021 as under:

Quote, “10. We find that the law as laid down by the Full Bench applies on all fours to the facts of the present case as in the show cause notice dated 12-2-2008, the Assistant Commissioner of Income-tax is not clear as to whether there was concealment of particulars of income or that the Assessee had furnished inaccurate particulars of income. We therefore find that issuance of such show cause notice without specifying as to whether the Assessee had concealed particulars of his income or had furnished inaccurate particulars of the same has resulted in vitiating the show cause notice.

Heavy reliance was placed by the learned counsel for the Revenue on the decision in Mak Data (P.) Ltd. (supra) to urge that the penalty contemplated by section 271 (1) (c) of the said Act was in the nature of civil liability and mens rea was not essential therein. The decision in Dilip N. Shroff (supra) having been held as not laying down good law in Dharmendra Textile Processors Ltd. (supra), it was submitted that the show cause notice issued in the present proceedings was liable to be upheld. It may be noted that all the decisions relied upon by the learned counsel for the Revenue were considered by the Full Bench while answering the issues referred to it on reference. The Full Bench having considered these decisions and having answered the question as regards defect in the notice under section 271(1)(c) of the said Act resulting in vitiating the penalty proceedings, we find ourselves bound by the answers given by the Full Bench. It would not be permissible for us to disregard this aspect and take a different view of the matter.

Accordingly, substantial question of law no. III is answered by holding that since the show cause notice dated 12-2-2008 does not indicate whether there was concealment of particulars of income or furnishing of incorrect particulars of such income, the same would vitiate the penalty proceedings.” Unquote.

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4.4 Thus, the Hon'ble jurisdictional High Court and other Hon'ble High Courts have held that notice was defective if the appropriate words, which were not applicable, were not struck off. In this case, it is observed that the Ld.CIT(A) has verified from the case records the impugned notice and gave the findings that the relevant portion was not struck off. The relevant part of the Ld.CIT(A)'s order is reproduced as under:

"The assessment folder was also called for in this case and it was seen that the penalty notice did not contain the strike off between and/or with respect to the two limbs of levy of penalty. The assessment order passed had also mentioned 'penalty proceedings u/s.271(1)(c) is initiated separately for concealment of income or for providing inaccurate particulars of income'".

The Ld.DR has not rebutted these findings of the Ld.CIT(A).

Therefore, we find that the said notice is defective.

5. In the case under consideration the AO has not struck the appropriate in applicable words in the penalty notice. Also as mentioned in earlier para, in the assessment order the AO has not mentioned whether the penalty is initiated for concealment or filling inaccurate particulars. If the AO intended to initiate the penalty on account of both for Concealment of Income and filling inaccurate particulars of Income then the AO should have specifically used the word "and" between the words "Concealment of Income", "filling inaccurate particulars of income", in the penalty notice. This issue goes to the root of initiation of penalty. Therefore, respectfully following Hon'ble jurisdictional High Court and the Hon'ble Bombay High Court (supra), it is held that the penalty u/s

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271(1)(c) is not maintainable. Hence, the Assessing Officer is directed to delete the penalty u/s 271(1)(c).

We do not intent to comment on the merits of the case as the penalty has been deleted on the basis of notice itself. Therefore, Ground Nos.2-4 filed by the Revenue are dismissed.

6. The Ground Nos.1 & 6 are general in nature. Ground No.5 is on merits of the penalty. Since, we have deleted the penalty on the technical ground; we are of the opinion that these grounds become academic in nature. Hence, these grounds dismissed as not adjudicated.

7. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced on the 24th day of August, 2022, in Chennai.

Sd/-
(महावीरसिंह)
(MAHAVIR SINGH)
उपाध्यक्ष/VICE PRESIDENT

Sd/-
(डॉ।दीपकपी.रिपोटे)
(DR. DIPAK P. RIPOTE)
लेखासदस्य/ACCOUNTANT MEMBER

चेन्नई/Chennai,
दिनांक/Dated: 24th August, 2022.
TLN

आदेशकीप्रतिलिपिअग्रेषित/**Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त (अपील)/CIT(A)
4. आयकरआयुक्त/CIT
5. विभागीयप्रतिनिधि/DR
6. गार्डफाईल/GF