

IN THE INCOME TAX APPELLATE TRIBUNAL
"E" BENCH, MUMBAI

SHRI M. BALAGANESH, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 2002/MUM/2021
(ASSESSMENT YEAR: 2012-13)

Scorodite Stainless India Pvt. Ltd.,
C/o. D.C. Bothra & Co. LLP (CA)
(formerly known as D.C. Bothra & Co.),
297, Tardeo Road, Wille Mansion,
1st Floor, Opp. Bank of India
Nana Chowk, Mumbai - 400007
[PAN: AABCS8987Q]

..... Appellant

A.C.I.T., Circle-5(3)(1), Mumbai,
5th Floor, Aayakar Bhavan,
M.K. Road, Mumbai - 400020

Vs

..... Respondent

Appearances

For the Appellant/Assessee : Shri Rajkumar Singh
For the Respondent/Department : Shri B.K. Bagchi

Date of conclusion of hearing : 13.06.2022
Date of pronouncement of order : 08.09.2022

ORDER

Per Rahul Chaudhary, Judicial Member:

1. By way of the present appeal the Appellant/Assessee has challenged the order, dated 18.10.2021, passed by the Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi [hereinafter referred to as 'the CIT(A)'] under Section 250 of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'] for the Assessment Year 2012-13, whereby the CIT(A) had dismissed the appeal against the order, dated 28.09.2018, passed under Section 271(1)(c) of the Act levying penalty of INR 37,25,254/-.

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

- “1. That on facts and circumstances of the case and in law the Id. A.O. and also Id. CIT(Appeals) both have grossly erred in imposing and confirming the penalty u/s. 271(1)(c) at Rs.37,25,254/- without appreciating that impugned penalty proceeding in the case was initiated on the charge of furnishing inaccurate of particulars of income whereas penalty under dispute was imposed on the charge of concealment of income and that too on the basis of defective penalty show cause notice issued without striking out inapplicable words and provisions. In view of the same impugned penalty order passed being invalid and without jurisdiction hence same may kindly be quashed and set aside.*
- 2. That without prejudice to appeal ground no.1, even on merit of the case, the Id. A.O. & also Id. CIT (Appeals) both have erred on facts of the case and in law in imposing and confirming the penalty u/s. 271(1)(c) at Rs.37,25,254/- without properly appreciating that disallowance subjected to impugned penalty was confirmed on estimate basis and the very basis and quantum of subject disallowance made by Id. A.O. was modified differently by appellate authorities. In view of the same impugned penalty imposed being wrong on facts and bad in law therefore same kindly be deleted.*
- 3. That the Id. C.I.T. (Appeals) has grossly erred in not following the several latest and binding judgments of various Co-Ordinate Benches of jurisdictional ITAT, Mumbai rendered on exactly identical and similar facts as to the case of assessee, propounding that no penalty u/s.271(1)(c) can legally be sustained for estimated disallowance made in respect of alleged hawala/non-genuine purchases.”*

3. Appellant has challenged the levy of penalty of INR 37,25,254/- by the Assessing Officer under Section 271(1)(c) of the Act which has been confirmed by the CIT(A) leading to the filing of the present appeal.

4. Brief facts of the case are that for the Assessment Year 2012-13 assessment under Section 143(3) of the Act was framed on the Appellant vide order dated 30.03.2015 at Income of INR 2,50,44,542/- after making addition of peak credit balance of INR 1,93,97,552/- to the returned income of INR 56,46,990/-. In appeal filed by the Appellant, the CIT(A), vide order dated 23.02.2017, restricted the addition to 12.5% of alleged hawala purchases of INR.9,03,09,184/-. The appeal filed by the Appellant/Assessee before the Tribunal for seeking further relief was dismissed by the Tribunal.
5. Since the Assessing Officer had also initiated penalty proceedings under Section 271(1)(c) of the Act, the Assessing Officer passed penalty order on 28.09.2018 levying penalty of INR 37,25,254/- being tax sought to be evaded on the concealed income of INR 12,88,648/- (12.5% of INR 9,03,09,184/-). Being aggrieved, the Appellant preferred appeal before CIT(A) which was dismissed. Now the Appellant is in appeal before us.
6. The Ld. Authorized Representative of the Appellant submitted the issue in the present appeal is covered in favour of the Appellant by the judgment of the Full Bench of the Hon'ble Bombay High Court in the case of **Mohd. Farhan A Shaikh Vs. DCIT, Central Circle-1, Belgaum** reported in **434 ITR 1 (Bombay)**, as the penalty notice, dated 30.03.2015 has been issued without deleting or striking off inapplicable part. He further submitted that even on merits, the Mumbai Bench of the Tribunal has, in the case of **Orient Fabritech Pvt. Ltd. vs. ITO, Range- 1(2)(4): ITA No. 1425/Mum/2021**, in identical facts and circumstances, deleted the penalty levied where additions were made on the estimate

basis. Per contra, the Ld. Departmental Representative relied upon the penalty order to support his case.

7. We have heard the parties, perused the record and considered legal position. The full Bench of the Hon'ble Bombay High Court in the case Mohd. Farhan A Shaikh Vs. DCIT (supra) has held that a mere defect in the notice - not striking off the irrelevant matter, would vitiate the penalty proceedings. The relevant extract of the aforesaid judgment reads as under:

"Answers:

Question No. 1: If the assessment order clearly records satisfaction for imposing penalty on one or the other, or both grounds mentioned in Section 271(1)(c), does a mere defect in the notice—not striking off the irrelevant matter—vitate the penalty proceedings?

***181. It does.** The primary burden lies on the Revenue. In the assessment proceedings, it forms an opinion, prima facie or otherwise, to launch penalty proceedings against the assessee. But that translates into action only through the statutory notice under section 271(1)(c), read with section 274 of IT Act. True, the assessment proceedings form the basis for the penalty proceedings, but they are not composite proceedings to draw strength from each other. Nor can each cure the other's defect. A penalty proceeding is a corollary; nevertheless, it must stand on its own. These proceedings culminate under a different statutory scheme that remains distinct from the assessment proceedings. Therefore, the assessee must be informed of the grounds of the penalty proceedings only through statutory notice. An omnibus notice suffers from the vice of vagueness." (Emphasis supplied)*

8. A perusal of the penalty notice, dated 30.03.2015 and 10.09.2018 (placed at page 23 to 25 of the paper book), issued

under Section 274 read with 271 of the Act would show that the notices are in the nature of an omnibus show cause notice issued without deleting or striking off the inapplicable part. Same is the case with the penalty order, dated 28.09.2018, passed under Section 271(1)(c) of the Act, as it also does not state under which limb of Section 271(1)(c) of the Act penalty has been levied. The relevant paragraph of the aforesaid penalty order reads as under:

"The above said amount of Rs. 1,12,88,648/- accordingly could only be brought to tax only after the case was selected for scrutiny on the basis of information received from the Investigation Wing in respect of Bogus Purchases. Moreover the CIT(A) and ITAT has confirmed the Bogus purchases made by the assessee at 12.5% of Bogus Purchases.

Had the case being not selected for scrutiny, the above sum could not be brought to tax as assessee fail to disclose same amount in the Return of Income filed u/s 139(1) of the I.T. Act, 1961. Therefore it is prove that the assessee has concealed particulars of income by furnishing inaccurate particulars of income. Therefore, it is evident that the assessee has conceal income to evade payment of taxes which attract penalty proceeding u/s 271(1)(c) of the I.T. Act, 1961 which states as under:

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In view of the above details discussion of the facts of the cases, I deem this is a fit case to levy penalty u/s 271(1)(c) of the Income Tax Act, 1961." (Emphasis supplied)

9. We note that the above judgment has been followed by the Mumbai Bench of the Tribunal in the case of Orient Fabritech Pvt. Ltd. (supra) cited by the Ld. Authorised Representative for the Appellant. The relevant extract of the aforesaid decision of the Tribunal read as under:

“4. Both sides heard, orders of the authorities below examined. The assessee is in appeal against levy of penalty in respect of assessee’s involvement in obtaining bogus purchase bills. In quantum proceedings, the AO made addition of the entire alleged bogus purchases. The matter travelled to the Tribunal, the Tribunal restricted the addition to 12.5% of the alleged bogus purchases. The addition has been made in the hands of assessee on account of bogus purchase merely on estimations. It is an accepted legal position that no penalty under section 271(1)(c) of the Act can be levied where additions are made on estimate. [Re: CIT Vs. Krishi Tyre Re-trading & Rubber Industries 360 ITR 580(Raj.), CIT Vs. Subhash Trading Company 221 ITR 110 (Guj.), CIT Vs. Sangrur Vanaspati Mills Ltd. 303 ITR 53 (P&H)].

5. We further find that the notice issued under section 274 r.w.s. 271(1)(c) of the Act dated 18.03.2015 and the subsequent notice issued under section 271(1)(c) of the Act dated 15.03.2019 falls short of the legal requirement to be a valid notice for levy of penalty. The first notice issued under section 274 r.w.s. 271(1)(c) is in Performa, without any application of mind by the AO. The irrelevant limb of section 271(1)(c) of the Act has not been struck off. The Hon’ble jurisdictional High Court in the case of Mohd. Farhan A. Shaikh (supra) has dealt with the issue where the notice was issued without striking off the irrelevant matter. The Hon’ble High Court held that non-striking off irrelevant matter would vitiate the penalty proceedings. The relevant extract of the judgment is reproduced here-in-below:

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6. In the second notice dated 15.03.2019, the AO has mentioned both the charges of section 271(1)(c) of the Act. This shows ambiguity in the mind of Assessing Officer with regard to charge under section 271(1)(c) of the Act, that is to be invoked. The Hon’ble Apex Court in the case of T. Ashok Pai Vs. CIT 292 ITR 11 has held the concealment of income and furnishing

inaccurate particulars of income carry different connotations. Thus, the AO is duty bound to clearly convey to the assessee the limb for which penalty is to be levied. Where the position is unclear, penalty is unsustainable.

7. Thus, the penalty levied under section 271(1)(c) of the Act is unsustainable on account of defect in statutory notice issued under section 274 of the Act, as well for the reason that penalty is levied on addition made on mere estimations. The impugned order is set-aside and the appeal of assessee is allowed."

10. Respectfully following the judgment of the Full Bench of the Hon'ble Bombay High Court in case of Mohammed Farhan A Shaikh vs DCIT (supra) and the decision of the Tribunal in the case of Orient Fabritech Pvt. Ltd. (supra) we delete the penalty of INR 37,25,254/- levied under Section 271(1)(c) of the Act. Accordingly, Ground No. 1 to 3 raised by the Appellant are allowed.

11. In result, appeal filed by the Appellant is allowed.

Order pronounced on 08.09.2022.

Sd/-
(M. Balaganesh)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 08.09.2022
Alindra, PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai