

IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH, MUMBAI
BEFORE SHRI BASKARAN BR, ACCOUNTANT MEMBER &
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 2964/Mum/2022

(A.Y: 1996-97)

NCFS Ltd 1 st Floor, 86Chateau Windsor, VN Road, Churchgate, Mumbai – 400020.	Vs.	ITO 1(2)(3) 5 th Floor, Aayakar Bhavan, Mumbai – 400020.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACN1604J		
Appellant	..	Respondent

Appellant by :	Shri N.R.Agarwal.AR
Respondent by :	Shri Chetan M. Kacha.DR

Date of Hearing	10.01.2023
Date of Pronouncement	11.01.2023

आदेश / O R D E R

PER PAVAN KUMAR GADALE JM:

The assessee has filed the appeal against the order of the National Faceless Appeal Centre (NFAC), Delhi / CIT(A), passed u/s 250 of the Act. The assessee has raised the following grounds of appeal:

- 1. The Ld. CIT(A) erred in confirming the order by ITO passed u/s 271(1)(c) of the Act.*
- 2. Ld. CIT(A) erred in dismissing the ground that, there is a confusion in the mind of AO about which limb penalty is to be levied.*

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2. The brief facts of the case are that the assessee is a Non Banking Financial Company (NBFC), the assessee's assessment was completed u/s 143 (3) of the Act on 30.03.1999 determining the total income of Rs. 5,38,37,341/ as against the return of loss of Rs. 5,58,08,961/- and the disputed issue was in respect of claim of depreciation of Rs.10,53,37,341/- on various assets leased to different parties was disallowed as the leases were mere financial transactions and lease simplicitor. Against the order, the assessee has filed an appeal before the CIT(A), whereas the CIT(A) has confirmed the action of the A.O. On further appeal, before Hon'ble Tribunal in ITA No. 2287/Mum/2001 dated 10.05.2005 has restore the disputed issue to the file of the Assessing Officer (AO) to decide de-novo in accordance with the Special Bench decision in the case of M/S Mideast Portfolio Management Ltd. Vs. DCIT 187 ITD 5371 (Mum) (SB). Further the AO based on the directions has passed the order sustaining the disallowance of depreciation vide order U/sec143(3) r.w.s 254 of the Act dated 31.03.2006. Against the order of the AO, the assessee has filed an appeal before the CIT(A),

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whereas the CIT(A) has confirmed the action of the AO and dismissed the assessee appeal. Aggrieved by the order, the assessee has filed appeal before the Hon'ble ITAT and vide order dated 17.07.2009 the disputed issue was restored to the file of AO for decided afresh after examining relevant aspects of the issue and judicial decisions. Subsequently, based on the directions, the AO has passed the order u/s 143(3) r.w.s 254 of the Act on 21.10.2010 determining a total income of Rs.2,90,01,170/- Aggrieved by the order, the assessee has filed an appeal before the CIT(A) and was partly allowed. Whereas the revenue has filed an appeal and the assessee has filed cross objection before the Hon'ble Tribunal. The ITAT in ITA4430/M/2016 &CO.no.48/M/2018 has dismissed the revenue appeal and partly allowed the cross objections vide order dated 23.04.2018.

3. Subsequently, the AO has initiated penalty proceedings u/s 271(1)(c) of the Act, whereas in the penalty proceedings the assessee was issued show cause notice and assessee has filed the detailed explanations referred at Page 3 Para 13 of the order. The AO has considered findings of scrutiny

assessment, submissions, facts of claim of depreciation disallowed and was not satisfied with the explanations dealt in the penalty order and levied a penalty of Rs.40,45,088/- and passed the order u/s 271(1)(c) of the Act dated 26-12-2018.

4. Aggrieved by the penalty order, the assessee has filed an appeal before the CIT(A). In the appellate proceedings, the assessee has raised additional ground of appeal on the validity of penalty notice. Whereas, the CIT(A) has confirmed the penalty levied by the A.O and dismissed the appeal. Aggrieved by the CIT(A) order, the assessee has filed an appeal before the Hon'ble Tribunal.

5. At the time of hearing, the Ld. AR of the assessee submitted that the assessee has cooperated in submitting the information with the A.O. Further the notice issued for levy of penalty is invalid and relied on the judicial decisions and prayed for allowing the appeal.

6. Contra, the Ld. DR submitted that the CIT(A) has rightly confirmed the penalty though technicalities raised by the assessee in the grounds of appeal are

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devoid of merits and prayed for dismissal of the assessee appeal.

7. We heard the rival submissions and perused the material on record. The sole crux of the disputed issue is that the assessee has challenged the levy of penalty on legal issue as the A.O. has not applied his mind and non striking of charge in the penalty notice i.e. whether the charge is for concealment of income or furnishing of inaccurate particulars of income. The Ld.AR demonstrated the copy of penalty notice placed at page 36&37 of the appeal memo and the submissions are realistic. We find the Jurisdictional Honble High Court of Bombay in Mohd Farhan A Shaikh Vs. DCIT in Tax Appeal No. 51 to 57 of 2012 dated 11.03.202(2021)125.taxmann.com253 (Bombay) has dealt on this disputed issue of not striking off charge in the penalty notice would vitiate the penalty proceedings. The Hon'ble High Court has made observations at page 56 as under;

180. One course of before us is curing a defect in the notice by referring to the assessment order, which may or not contain reason for the penalty proceedings. The other course of action is the prevention of defect in the notice – and that prevention

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takes just a tick mark. Prudence demands prevention is better than cure.

Answers:

Question No. 1: If the assessment order clearly records satisfaction for imposing penalty on one or the other, or both grounds mentioned in Sec. 271(1)(c), does a mere defect in the notice – not striking off the irrelevant matter vitiate 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 Sec. 271(1)(c), r.w.s. 274 of the 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 deferent 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.

182. More Particularly, a penal provision, even with civil consequences, must be construed strictly. And ambiguity, if any, must be resolved in the affected assessee's favour.

8. We have considered the facts, circumstances and ratio of the decision of Honble High Court and are of the view that in the present case the A.O has not has not strike off the charge for levy of penalty for

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concealment of income or for furnishing of inaccurate particulars of income. Accordingly, we set aside the order of the CIT(A) and quash the penalty notice. And allow the grounds of appeal in favour of the assessee.

9. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 11.01.2023.

Sd/-

(BASKARAN BR)
ACCOUNTANT MEMBER

Sd/-

(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated 11.01.2023

KRK, PS

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

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

आदेशानुसार / BY ORDER,

सत्यापित प्रति //True Copy//

1.

(Asst. Registrar)
ITAT, Mumbai